Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

DESERT PALACE, INC., DBA
CAESARS PALACE HOTEL & CASINO,
Petitioner,

v.

CATHARINA F. COSTA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in holding that direct evidence is not required in Title VII cases to trigger the application of the "mixed-motive" analysis set out in *Price Waterhouse v. Hopkins*?

2. What are the appropriate standards for lower courts to follow in making a direct evidence determination in "mixed-motive" cases under Title VII?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner Desert Palace, Inc., dba Caesars Palace Hotel & Casino is wholly owned by Park Place Entertainment, Inc., which is a publicly traded corporation. Park Place Entertainment, Inc. is unaware of any publicly traded company owning 10 percent or more of its stock.

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OPINIONS BELOW

The August 2, 2002, *en banc* opinion of the United States Court of Appeals for the Ninth Circuit is reported at 299 F.3d 838 (9th Cir. 2002) and is reprinted at App. 1a - 53a. The October 2, 2001, Ninth Circuit panel opinion is reported at 268 F.3d 882 (9th Cir. 2001) and is reprinted at App. 54a - 69a. The January 28, 1999, order of the United States District Court for the District of Nevada is reprinted at App. 70a - 87a.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its *en banc* opinion on August 2, 2002. This petition for certiorari is timely in that Petitioner has filed it within 90 days of August 2, 2002. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of Title VII of the Civil Rights Act of 1964 ("Title VII"), 29 U.S.C. § 2000e *et. seq.* Specifically, 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m) and 2000e-5(g)(2)(B) are the relevant statutes involved in this Petition.

42 U.S.C. § 2000e-2(a)(1) provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or

otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-2(m) provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-5(g)(2)(B) provides:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court —

> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

STATEMENT OF THE CASE

I. Overview of the Case

The Ninth Circuit panel held that the district court committed reversible error by giving a mixed-motive jury instruction on Title VII claims in the absence of direct evidence of discriminatory animus. A 7-4 majority of the *en banc* Ninth Circuit reversed and ruled that direct evidence is not required to trigger a mixed-motive analysis in cases brought under Title VII.

The *en banc* majority holding directly conflicts with the Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) on an important question of federal law and, as noted by the *en banc* dissent, places the Ninth Circuit "in conflict with almost all others." App. 51a.

II. Background of the Case

Catharina Costa was hired by Petitioner Desert Palace, Inc. dba Caesars Palace Hotel Casino ("Caesars") in 1987, and her employment was terminated in 1994 after a physical/verbal confrontation with a co-worker. App. 51a - 52a. Costa had a number of prior warnings and suspensions because of her inability to get along with others. *Id.* Costa was represented by the Teamsters Union and took her termination to arbitration through the Union. *Id.* After a hearing, the arbitrator ruled that Costa was terminated for just cause and denied the grievance. *Id.*

Costa filed this Title VII case alleging gender discrimination in connection with the conditions of her employment and her termination.[1] Over the objection of counsel for Caesars, the district court gave the jury the following "mixed-motive" instruction.

> **You have heard evidence that the defendant's treatment of plaintiff was motivated by the plaintiff's sex** and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

App. 33a - 34a. (Emphasis added.)

No doubt guided by the first sentence of the mixed-motive instruction, the jury answered the first question on the verdict form as follows:

> Do you find that Defendant Caesars Palace violated the Civil Rights Act in that Plaintiff's gender (sex) was a motivating factor in any adverse condition of plaintiff's employment.
>
> Yes _X_ No ____

App. 88a.

III. Proceedings Below

At trial the district court overruled Caesars' objection to giving the mixed-motive jury instruction and subsequently denied Caesars' post trial motion for judgment as a matter of law. App. 57a - 58a, 86a. On appeal, the Ninth Circuit panel held that the district court erred in giving the mixed-motive jury instruction that impermissibly shifted the burden of proof on causation to Caesars. Citing *Price Waterhouse* and numerous circuit court decisions addressing the issue, the panel concluded that a mixed-motive jury instruction is only

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[1] The district court had federal question jurisdiction over this Title VII case pursuant to 28 U.S.C. § 1331.

proper if a Title VII plaintiff produces "direct and substantial evidence of discriminatory animus." App. 59a - 65a. After reviewing the evidence presented by Costa, the panel concluded that Costa did not present sufficient "direct and substantial" evidence to allow the mixed-motive jury instruction. *Id.*[2]

The Ninth Circuit granted Costa's petition for a rehearing *en banc*. In a 7-4 decision, the *en banc* majority overruled the panel and held that the district court properly gave the mixed-motive jury instruction and shifted the burden of proof to Caesars. The *en banc* majority did not hold that Costa presented direct evidence of discrimination sufficient to justify mixed-motive treatment of her case. Rather, the *en banc* majority held that direct evidence of discrimination is simply not required in Title VII cases to trigger application of the mixed-motive analysis. That holding is in direct conflict with the Court's *Price Waterhouse* decision, and it places the Ninth Circuit in conflict with all other circuit courts.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. One consideration is that a "United States court of appeals has decided an important question of federal law . . . that conflicts with relevant decisions of this Court." Another consideration is that a "United States court of appeals has entered a decision

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[2] The panel vacated the judgment with respect to the gender discrimination claim and reversed the district court's refusal to enter judgment as a matter of law on the termination claim. App. 66a, 69a.

in conflict with the decision of another United States court of appeals on the same important matter. . . ." Finally, the Court considers whether the court of appeals decision "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power . . . ."

All of these considerations are present in this case. Employment discrimination claims filed in federal court constitute the second most numerous type of federal claim filed.[3] Evidentiary and proof requirements under Title VII raise important questions of federal law. The *en banc* majority's holding that direct evidence of discrimination is not required to trigger a mixed-motive analysis is in direct conflict with the Court's holding in *Price Waterhouse*. In fact, the *en banc* majority considers Justice O'Connor's direct evidence requirement not as the holding of the Court, but rather as a mere "passing reference." App. 8a, 17a. The *en banc* majority's holding is also in direct conflict with decisions from other circuit courts that interpret *Price Waterhouse*. The *en banc* majority's opinion allowing the burden of proof in Title VII cases to shift to the employer without any heightened evidentiary showing is such a departure from the usual course of judicial proceedings that the Court should exercise its supervisory powers. Finally, review is warranted to provide guidance to the lower courts on the appropriate standards to follow in making direct

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[3] In 2001, there were 21,157 employment discrimination cases on the dockets of United States District Courts. Leonidas, Ralph Mecham, 2001 *Annual Report of the Director for the Judicial Business of the United States Court*, at Table C-2A, ⟨ http. // www.uscourts.gov / judbususc / judbus.html ⟩. Only general habeas corpus petitions comprised a larger portion of the courts' civil dockets - 24,684 cases. *Id.*

evidence determinations in mixed-motive cases brought under Title VII.

The Court's review is warranted for all of these reasons.

I. Review Is Warranted Because the *En Banc* Majority Decision Is in Direct Conflict with the Court's *Price Waterhouse* Decision

Disparate treatment claims under Title VII can be proven by direct or circumstantial evidence. Direct evidence of intentional discrimination is "hard to come by." *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring). *See also Fernandes v. Costa Brothers Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) ("direct evidence is relatively rare"). The Court established a framework for analyzing the typical circumstantial evidence case brought under Title VII in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and later elaborated in *Texas Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

The *McDonnell Douglas/Burdine* framework is a three step, burden-shifting method to prove intentional discrimination despite the unavailability of direct evidence. The first step requires the plaintiff to establish a prima facie case of discrimination. Once a prima facie case is established, the burden of production, but not proof, "shifts to the employer to articulate some legitimate, nondiscriminatory reason for [the adverse action]." *McDonnell Douglas*, 411 U.S. at 802. If the employer makes such a showing, the burden shifts back to the plaintiff to prove that the articulated reason is pretextual. *Burdine*, 450 U.S. at 253-55. If the plaintiff cannot prove pretext, the employer prevails. *McDonnell Douglas*, 411 U.S. at 807. Throughout the

McDonnell Douglas/Burdine procedure the ultimate burden of proof remains at all times with the plaintiff, *id.* at 256, and it is never the employer's burden to prove the absence of discriminatory motive. *Bd. of Tr. of Keene State Coll. v. Sweeney*, 439 U.S. 24, 25 (1978).

In 1989, the Court in *Price Waterhouse* articulated a "mixed-motive" analysis for Title VII cases that in narrow circumstances shifts the burden of persuasion on causation to the employer. The *Price Waterhouse* plurality opinion[4] stated that when mixed-motives drive an employment decision, the *McDonnell Douglas/Burdine* analysis does not apply. *Price Waterhouse*, 490 U.S. at 245-47. If the plaintiff proves that an unlawful criterion "played a motivating part in an employment decision," the burden of persuasion shifts to the employer to prove by a preponderance of the evidence that the same decision would have been made absent the unlawful criterion. *Id.* at 258.[5] The plurality decision did not articulate what evidence is necessary to shift the burden of persuasion to the employer in mixed-motive cases. The *Price Waterhouse* dissent[6] asserted that the *McDonnell*

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[4] Justices Brennan, Marshall, Blackmon and Stevens.

[5] The plurality further stated that when an employer carries its burden of proof, it avoids liability outright. *Id.* This part of the opinion was changed by the 1991 amendments to Title VII, 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B). The 1991 amendments allow limited remedies even when the employer succeeds in proving the "same decision" defense. As demonstrated below, these amendments were silent on the portion of *Price Waterhouse* that addressed the nature of the evidence necessary to trigger the mixed-motive analysis.

[6] Justices Kennedy, Rehnquist and Scalia.

Douglas/Burdine framework fully addressed the different measures through which a plaintiff could prove illegal discrimination, without shifting the burden of persuasion to the employer in a mixed-motive case. *Id.* at 279-80, 288.

Justice O'Connor's deciding concurrence agreed with the plurality's burden-shifting approach, but clarified the type of evidence necessary to trigger the mixed-motive analysis. *Id.* at 261-79. Justice O'Connor wrote separately in part to "express my views as to when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered." *Id.* at 262. Specifically, Justice O'Connor stated that a mixed-motive burden shifting analysis is triggered only by "**direct evidence** that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision." *Id.* at 277 (emphasis added). The concurring opinion of Justice O'Connor is the holding of the Court because it was the narrowest ground supporting the judgment. *See* Part III A, below.

The Ninth Circuit panel opinion noted that it had not previously addressed the evidentiary burden on a plaintiff in a Title VII mixed-motive case. App. 60a. The panel properly concluded that Justice O'Connor's direct evidence requirement was controlling when it decided whether to apply the mixed-motive analysis. App. 65a. After analyzing Costa's evidence, the panel concluded that Costa did not present direct evidence of discrimination. App. 63a - 65a. Consequently, the panel held that the district court erred in giving the mixed-motive jury instruction and vacated the lower court judgment . *Id.*

In a 7-4 decision, the *en banc* Ninth Circuit held that direct evidence is not required to trigger the mixed-motive

analysis and that no heightened evidentiary burden is necessary to trigger such an analysis. App. 17a - 18a. The *en banc* majority opinion directly conflicts with the Court's holding in *Price Waterhouse*. The *en banc* majority concluded that Justice O'Connor's direct evidence requirement was a mere "passing reference," and that courts that interpret *Price Waterhouse* as requiring such evidence to trigger a mixed-motive analysis are simply wrong. App. 17a - 24a. For this reason alone, the Court should grant this Petition.

The *en banc* majority opinion not only conflicts with the Court's *Price Waterhouse* holding, by but failing to impose the heightened evidentiary requirement as mandated by *Price Waterhouse*, it effectively circumvents the *McDonnell Douglas/Burdine* analysis. Without the *Price Waterhouse* evidentiary restraint on when Title VII plaintiffs may invoke the mixed-motives analysis, every plaintiff will opt for that analysis in order to shift the burden of proof on causation to the employer. "It is readily apparent that this mixed-motive approach, uncabined, has the potential to swallow whole the traditional *McDonnell Douglas* analysis." *Fernandes*, 199 F.3d at 580.

Improperly shifting the burden of proof to Caesars is exactly what the *en banc* majority did in this case. The majority recognized that: "In many respects, Costa's case presents a typical Title VII case in which a plaintiff alleges that she was discharged or disciplined for a discriminatory reason and the employer counters that the reason for its action was entirely different." App. 34a. Caesars suggests that this is the scenario in virtually all Title VII discharge and disciplinary cases. Following the *en banc* majority's holding, which ignores the *Price Waterhouse* heightened evidentiary burden, would result in an impermissible shift of the burden

of proof on causation to the employer in virtually all Title VII cases. Such a result is contrary to over 25 years of jurisprudence under Title VII since *McDonnell Douglas*.

II. Review Is Warranted Because the *En Banc* Majority Decision Is in Direct Conflict with Circuit Court Decisions on This Important Aspect of Federal Law

The *en banc* majority's opinion that direct evidence is not required to trigger a mixed-motive analysis creates a conflict between the Ninth Circuit and all other circuit courts that have considered the question. As the *en banc* dissenting opinion correctly noted:

> The majority's holding puts our circuit in conflict with almost all others. *See Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir. 1990); *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995); *Brown v. E. Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir. 1991); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997); *Schleiniger v. Des Moines Water Works*, 925 F.2d 1100, 1101 (8th Cir. 1991); *Heim v. Utah*, 8 F.3d 1541, 1547 (10th Cir. 1993); *E.E.O.C. v. Alton Packaging Corp.*, 901 F.2d 920, 923 (11th Cir. 1990).

App. 51a.

Recent decisions from the circuit courts further confirm this conflict. *See Weston-Smith v. Cooley Dickinson Hosp., Inc.*, 282 F.3d 60, 64 (1st Cir. 2002) (direct evidence is required to trigger the mixed-motive analysis set forth in *Price Waterhouse*); *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 163 (2d Cir. 2001) ("where a plaintiff provides sufficiently direct evidence of discriminatory animus and also challenges all of defendant's proffered motives as pretextual, a jury must be instructed, if requested, to apply the *Price Waterhouse* burden-shifting analysis if it finds the employer was motivated by discriminatory animus but is not fully persuaded by the plaintiff's claims of pretext"); *Fakete v. Aetna, Inc.*, 2002 U.S. App. LEXIS 22156, at *8 (3rd Cir. 2002) ("Under *Price Waterhouse*, when an ADEA plaintiff alleging unlawful termination presents 'direct evidence' that his age was a substantial factor in the decision to fire him, the burden of persuasion on the issue of causation shifts, and the employer must prove that it would have fired the plaintiff even if it had not considered his age."); *Wagner v. Dillard Dep't. Stores, Inc.*, 2001 WL 967495, at *5 (4th Cir. 2001) ("In order to merit the more favorable mixed-motive jury instruction, a plaintiff must present 'direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion,'" *quoting Price Waterhouse*, 490 U.S. at 277); *Haas v. ADVO Sys., Inc.*, 168 F.3d 732, 734 (5th Cir. 1999) (failing to reach the issue of defendant's mixed-motive defense because plaintiff failed to provide "direct evidence" of discrimination); *Laderach v. U-Haul of Northwestern Ohio, et al.*, 207 F.3d 825, 829 (6th Cir. 2000) ("Once there is direct evidence, the burden of persuasion shifts to the defendant . . ."); *Maldonado v. U.S. Bank and Manufacturers Bank*, 186 F.3d 759, 763 (7th Cir. 1999) (court explains the difference between *Price Waterhouse* direct evidence case and *McDonnell Douglas* circumstantial evidence case); *Mohr v. Dustrol, Inc.*, 2002 U.S. App.

LEXIS 20652, at **7-8 (8th Cir. 2002) (holding that if a plaintiff "can produce direct evidence that an illegal criterion was a motivating factor in the disputed employment decision . . . the plaintiff is relieved of the ultimate burden of persuasion and the so-called 'mixed-motive' analysis is applied"); *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1208 (10th Cir. 1999) ("Generally, a mixed-motives analysis only applies once a plaintiff has established direct evidence of discrimination."); *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641-42 (11th Cir. 1998) (The plaintiff did not present sufficient direct evidence to trigger the *Price Waterhouse* burden-shifting analysis.).

The conflict in the circuits created by the Ninth Circuit *en banc* majority opinion further warrants review by the Court.

III. The Reasoning of the *En Banc* Majority for Refusing to Follow *Price Waterhouse* and Other Circuit Courts Is Erroneous

As demonstrated above, the *en banc* majority held that direct evidence is not necessary to trigger the mixed-motive analysis in Title VII cases. The majority concluded that the direct evidence requirement was a mere "passing reference" and not the holding of the Court. App. 8a, 17a. The majority felt it "unnecessary" to get "mired in the debate over whether Justice O'Connor's opinion was controlling or not" because, in the majority's view, the 1991 amendments to Title VII "wholly abrogated" the premise for Justice O'Connor's direct evidence "comment." App. 17a. Finally, the majority characterized other circuit court decisions interpreting and applying the direct evidence requirement as a "quagmire," "this morass," "chaos" and "a veiled excuse to substitute their own judgment for that of a jury." App. 18a, 21a, 23a - 24a.

Rather than "get bogged down in this debate" and decide whether Costa presented direct evidence, the *en banc* majority elected to simply ignore the *Price Waterhouse* direct evidence requirement altogether. App. 18a.

None of the reasons articulated by the majority for refusing to follow the *Price Waterhouse* direct evidence requirement is valid. The majority's refusal further warrants the granting of this Petition and the exercise of the Court's supervisory power.

A. Justice O'Connor's concurring opinion in *Price Waterhouse* is the narrowest ground for the decision and is therefore controlling; the direct evidence requirement is not a mere "passing reference," but rather the holding of the Court

The concurring opinion of Justice O'Connor in *Price Waterhouse* is the holding of the Court. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds . . . .") Applying the principle of *Marks* to *Price Waterhouse*, Justice O'Connor's concurrence that requires direct evidence as the evidentiary prerequisite to a mixed-motive analysis is the narrowest ground supporting the judgment of the Court. *Fernandes v. Costa Brothers Masonry, Inc.*, 199 F.3d 573, 580 (1st Cir. 1999); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2nd Cir. 1992), *cert. denied*, 506 U.S. 826

(1992).[7]

The *en banc* majority's view that the direct evidence requirement is a mere "passing reference" is erroneous and contrary to Supreme Court authority.

B. The 1991 Amendments to Title VII did not abrogate the *Price Waterhouse* direct evidence requirement

The *en banc* majority's conclusion that the 1991 amendments to Title VII somehow "abrogated" Justice O'Connor's direct evidence requirement is simply wrong. The 1991 amendments only overruled *Price Waterhouse* to the extent that before the amendment an employer who proved the "same decision" defense in a mixed-motive case could avoid liability outright. 42 U.S.C. § 2000e-2(m) and § 2000e-5(g)(2)(B).[8] These statutory amendments, however, were silent to that portion of the *Price Waterhouse* holding that direct evidence is required to trigger a mixed-motive case in the first place. *Fields v. New York State Office of Mental Retardation & Developmental Disabilities*, 115 F.3d 116, 124 (2d Cir. 1997) ("[T]he House Committee report makes it clear that section 107 was enacted solely to overrule the part of *Price Waterhouse* that allowed an employer to avoid liability by prevailing on its dual motivation defense."). *See also Watson v. Southeastern Pa. Transp. Auth.*, 207 F.3d 207, 216 (3rd Cir. 2000), *cert. denied*, 531 U.S. 1147 (2001).

[7] The *Price Waterhouse* dissent agreed that Justice O'Connor's opinion was the holding of the Court. The dissent read the holding in *Price Waterhouse* as shifting the burden to the employer only "in a limited number of cases" where the "plaintiff proves by **direct evidence** that an unlawful motive was a substantial factor actually relied upon in making the decision." *Price Waterhouse*, 490 U.S. at 280 (Kennedy, J., dissenting) (emphasis added).

[8] After the 1991 amendments an employer who proves the "same decision" defense limits but does not avoid liability altogether.

Congress did not overrule or reject the direct evidence requirement in mixed-motive cases as demonstrated above. All circuit courts after the 1991 amendments still require direct evidence to trigger the mixed-motive analysis. The 1991 amendments did not "abrogate" the direct evidence requirement in *Price Waterhouse* as claimed by the *en banc* majority.

IV. Review Is Also Warranted to Resolve the Confusion Among the Lower Courts Regarding the Appropriate Standards to Follow in Making a Direct Evidence Determination in Mixed-Motive Cases

Another reason cited by the *en banc* majority for rejecting the *Price Waterhouse* direct evidence requirement is the "chaos" created by the efforts of circuit courts to define and apply the direct evidence requirement. App. 21a. The *en banc* majority cites Judge Selya's description of the various approaches used by the circuit courts to apply the direct evidence requirement that is set out in *Fernandes v. Costa Brothers Masonry, Inc.*, 199 F.3d 572 (1st Cir. 1999). App. 19a - 21a. *Fernandes* argues that application of the direct evidence requirement "has created a patchwork of intra-circuit conflicts" and then places the circuit courts within these various camps. *Id.* at 582-83. *Fernandes* categorizes the circuit court approaches on this issue as follows: (1) the

"classic" approach, (2) the "animus plus" approach, and (3) the "animus" standard. *Id.* at 579-583.

Circuit courts are using different approaches to apply the *Price Waterhouse* direct evidence requirement, but they are not ignoring the requirement. The "chaos" caused by these different approaches does not provide cover for the *en banc* majority simply to ignore the requirement and shift the burden of proof improperly to the employer in Title VII cases. This is not a case where the *en banc* majority is simply incorrect in its application of the *Price Waterhouse* evidentiary requirement. Rather, the *en banc* majority has decided simply to ignore the requirement.

The "chaos" caused by the various approaches used by the circuit courts to apply the direct evidence requirement does not allow the *en banc* majority to ignore the requirement, but it does provide yet another reason for granting this Petition. With this Petition, Caesars asks the Court to conclude that the Ninth Circuit *en banc* majority erroneously held that direct evidence is not required to trigger a mixed-motive analysis in Title VII cases. Caesars also asks the Court to use this case to provide uniform guidance to the lower courts as to what constitutes direct evidence for purposes of triggering the mixed-motive analysis. Such guidance will enable lower courts to discern what evidence is required to trigger the mixed-motive analysis and will put an end to the "chaos" cited by the *en banc* majority and the *Fernandes* case. The *Price Waterhouse* dissent predicted that the holding of the Court that day was "certain to result in confusion." *Price Waterhouse*, 490 U.S. at 279 (Kennedy, J., dissenting). It has. What no one could have predicted was that a lower court would simply ignore the *Price Waterhouse* holding.

CONCLUSION

The petition for a writ of certiorari should be granted. The *en banc* majority opinion conflicts with the holding of the Court in *Price Waterhouse* and with other circuit court decisions. The Court should reverse the *en banc* majority for these reasons. Caesars further requests that the Court grant this Petition and provide uniform guidance to the lower courts as to what constitutes direct evidence for purposes of triggering the mixed-motive analysis in Title VII cases.

Respectfully submitted.

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OCTOBER 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-15645

[Filed August 2, 2002]

CATHARINA F. COSTA, Plaintiff-Appellee,	)
v.	)
DESERT PALACE, INC., dba Caesars Palace Hotel & Casino, Defendant-Appellant.	)

Appeal from the United States District Court
for the District of Nevada
D.C. No. CV-96-00009-DWH/RJJ
David Warner Hagen, District Judge, Presiding

JUDGES:
Before: Mary M. Schroeder, Chief Judge, Stephen Reinhardt, Alex Kozinski, Ferdinand F. Fernandez, Andrew J. Kleinfeld, Barry G. Silverman, Susan P. Graber, M. Margaret McKeown, Raymond C. Fisher, Ronald M. Gould, and Richard A. Paez, Circuit Judges. Opinion by Judge McKeown; Dissent by Judge Gould.

OPINION

McKEOWN, Circuit Judge:

We agreed to hear this case en banc[1] primarily to examine the legal standard for proof of a violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. In this classic instance of what has been termed a "mixed-motive" case, the employer, Caesars Palace Hotel and Casino ("Caesars"), terminated Catharina Costa, the only woman in her bargaining unit, citing disciplinary problems. Costa argued, and the jury agreed, that sex was "a motivating factor" in her termination. 42 U.S.C. § 2000e-2(m). Because Caesars failed to establish that she would have been terminated without consideration of her sex, the jury awarded back pay and compensatory damages. Finally, the jury found that the discrimination was "egregious" and warranted punitive damages. Caesars argues that Costa should have been held to a special, higher standard of "direct evidence," a threshold it claims she did not meet. We disagree. Title VII imposes no special or heightened evidentiary burden on a plaintiff in a so-called "mixed-motive" case. Consequently, we affirm the liability finding as well as the judgment for back pay and compensatory damages. In light of intervening Supreme Court authority, we remand with respect to punitive damages. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 144 L. Ed. 2d 494, 119 S. Ct. 2118 (1999).

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[1] *Costa v. Desert Palace, Inc.*, 268 F.3d 882 (9th Cir. 2001), *reh'g en banc granted*, 274 F.3d 1306 (9th Cir. 2002).

BACKGROUND

Catharina Costa is a trailblazer. She has worked most of her life in a male-dominated environment, driving trucks and operating heavy equipment. At Caesars, a well known casino in Las Vegas, she worked in a warehouse and, along with members of her bargaining unit, Teamsters Local 995, operated the forklifts and pallet jacks to retrieve food and beverage orders. Costa was the only woman in this job.

Costa's work was characterized as "excellent" and "good." As her supervisor explained: "We knew when she was out there the job would get done." Nonetheless, she experienced a number of problems with management and her co-workers. At first, she responded by simply focusing on doing her job well. Slowly, Costa began to notice that she was being singled out because she was a woman. Her concerns not only fell on deaf ears - "my word meant nothing" - but resulted in her being treated as an "outcast."

In a series of escalating events that included informal rebukes, denial of privileges accorded her male co-workers, suspension, and finally discharge, Costa's efforts to resolve problems were thwarted along the way. The situation deteriorated so significantly that she finally complained to the human resources department, which declined to intervene.

There were "so many" incidents, it was difficult for her to recount them all. Nonetheless, her testimony at trial on this point was detailed and extensive. For example, when men came in late, they were often given overtime to make up the lost time; when Costa came in late - in one case, one minute late - she was issued a written reprimand, known as a record

of counseling. When men missed work for medical reasons, they were given overtime to make up the lost time; when Costa missed work for medical reasons, she was disciplined. On one occasion, a warehouse supervisor actually suspended her because she had missed work while undergoing surgery to remove a tumor; only the intervention of the director of human resources voided this action.

In another episode, corroborated at trial by a fellow employee who was an eyewitness, a number of workers were in the office eating soup on a cold day. A supervisor walked in, looked directly at Costa, and said, "Don't you have work to do?" He did not reprimand any of her colleagues - all men. Another supervisor began to follow her around the warehouse. Although several other Teamsters complained about this supervisor's scrutiny, three witnesses, in addition to Costa, testified that she was singled out for particularly intense "stalking."

Costa presented extensive evidence that she received harsher discipline than the men. For instance, she was frequently warned and even suspended for allegedly hazardous use of equipment and for use of profanity, yet other Teamsters engaged in this conduct with impunity. In at least one instance, such a charge against Costa was found to have been fabricated and the suspension voided. Supervisors began to "stack" her disciplinary record. In one case, a supervisor issued multiple warnings on a single day, including docking her for an absence that dated back over eight months and for absences that occurred when Costa was under a doctor's care. Another warehouse manager steered a co-worker who had a dispute with Costa to security instead of handling the matter

himself because the manager wanted to bring "this problem with Costa to a 'head.'"

Costa was also treated differently than her male colleagues in the assignment of overtime. For example, in an analysis of 95.5 hours of overtime assigned to eight Teamsters, Costa received only two hours. Failure to assign overtime was not for Costa's lack of willingness to work additional hours. Costa was listed as "refusing" overtime when she was on vacation. When she was offered overtime, it was at the last minute, making it impractical for her to accept. The situation became more blatant when Costa asked her supervisors point blank about the differential treatment of another Teamster who was favored with overtime assignments. The response: He "has a family to support."

Costa also presented evidence that she was penalized for her failure to conform to sexual stereotypes. Although her fellow Teamsters frequently lost their tempers, swore at fellow employees, and sometimes had physical altercations, it was Costa, identified in one report as "the lady Teamster," who was called a "bitch," and told "you got more balls than the guys." Even at trial, and despite testimony that she "got along with most people" and had "few arguments," Caesars' managers continued to characterize her as "strong willed," "opinionated," and "confrontational," leading counsel to call her "bossy" in closing argument. Supervisor Karen Hallett, who later signed Costa's termination order, expressly declared her intent to "get rid of that bitch," referring to Costa.

Supervisors frequently used or tolerated verbal slurs that were sex-based or tinged with sexual overtones. Most

memorably, one co-worker called her a "fucking cunt." When she wrote a letter to management expressing her concern with this epithet, which stood out from the ordinary rough-and-tumble banter, she received a three-day suspension in response. Although the other employee admitted using the epithet, Costa was faulted for "engaging in verbal confrontation with co-worker in the warehouse resulting in use of profane and vulgar language by other employee."

These events culminated in Caesars' termination of Costa. The purported basis for termination was a physical altercation in the warehouse elevator with another Teamster, Herb Gerber. This incident began, as Gerber admitted, when he went looking for Costa, upset about a report that he believed she had made about his unauthorized lunch breaks. Gerber trapped Costa in an elevator and shoved her against the wall, bruising her arm. Costa gave a detailed account of the altercation. Right away she told supervisor Hallett. Reassured that Hallett would investigate, Costa returned to work, only to have Gerber seek her out and "come at" her a second time. Costa's account was also corroborated by her immediate reports to union officials, by photographs of the bruises, and by a witness who had seen Gerber blocking the elevator door. In contrast, Gerber did not immediately report the incident, had no physical corroboration, and provided few details. He first denied that the altercation was physical, but then changed his story to state that Costa had, in fact, hit him.

Nonetheless, Caesars did not believe Costa. Caesars reasoned that the facts were in dispute, so it disciplined both employees - Gerber with a five-day suspension and Costa with termination.

Both Costa and Gerber grieved their respective disciplines pursuant to the collective bargaining agreement, which did not cover sex discrimination. The arbitrator upheld both actions. After receiving an EEOC right to sue letter, Costa filed this suit. The trial court dismissed her claim of sexual harassment on summary judgment, but allowed the other disparate treatment claim to proceed.

At trial, Caesars maintained that Costa was terminated because of her disciplinary history and her altercation with Gerber. Costa did not suggest that she was a model employee, but rather that her sex was a motivating factor in her termination. After hearing Costa's testimony, Judge Hagen, the trial judge, admonished counsel: "This is a case that should have settled." He denied Caesars' motion for judgment as a matter of law at the close of Costa's case, which was renewed at the close of the evidence. The jury returned a verdict in favor of Costa for $64,377.74 back pay, $200,000 compensatory damages, and $100,000 punitive damages. When Judge Hagen denied defense motions for judgment as a matter of law notwithstanding the verdict, and for a new trial, he elaborated as follows: "At trial, the evidence showed a pattern of disparate treatment favoring male co-workers over plaintiff in the application of disciplinary standards, allowance of overtime, and in her termination. From this evidence reasonable minds could infer that plaintiff's gender played a motivating part in Caesars's conduct towards plaintiff ...." He did, however, grant remittitur, and Costa agreed to reduce compensatory damages to $100,000.

DISCUSSION

Title VII itself provides the benchmark for resolving the primary question in this case. Although the road from Title VII to resolution of Costa's case rests ultimately on a straightforward examination of the statute, it is helpful to examine the statute's structure and the history of the 1991 amendments to the statute. After analyzing the import of the passing reference to "direct evidence" in Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 270, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989), and the framework for Title VII cases, we address the evidence in Costa's case, including the claim that evidence of an arbitration award was erroneously excluded, and the propriety of giving a "mixed-motive" jury instruction. We conclude by examining the punitive damages award in light of *Kolstad*, 527 U.S. 526, 144 L. Ed. 2d 494, 119 S. Ct. 2118.

I. TITLE VII STATUTORY FRAMEWORK AND DEVELOPMENT

Title VII prohibits discrimination "because of" a protected characteristic, such as race or sex. Such discrimination is deemed "an unlawful employment practice":

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

> compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-2(a).

The 1991 Act added § 2000e-2(m), which provides that "an unlawful employment practice is established" when a protected characteristic is "a motivating factor" in an employment action:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Civil Rights Act of 1965, Title VII, § 701, 42 U.S.C. § 2000e-2(m) (as amended by Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071 (1991)).

The 1991 Act also provided an affirmative defense that limits the remedies if an employer demonstrates that it would have nonetheless made the "same decision":

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court -

> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-5(g)(2)(B).

We think this text is crystal clear: an employee makes out a Title VII violation by showing discrimination "because of" race, sex, or another protected factor. Such discrimination is characterized by the statute as "an unlawful employment practice."

More specifically, "an unlawful employment practice" encompasses any situation in which a protected characteristic was "a motivating factor" in an employment action, even if there were other motives. In such a case - sometimes labeled with the "mixed-motive" moniker - if the employee succeeds in proving only that a protected characteristic was one of several factors motivating the employment action, an employer cannot avoid liability altogether, but instead may assert an affirmative defense to bar certain types of relief by showing the absence of "but for" causation.

The amendments to the statute have done nothing to change the plaintiff's long-standing burden: "The ultimate

burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981); *accord Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000). Nor can we discover anything in this statute that warrants imposing a special evidentiary rule on or hurdle for victims of discrimination to prove their case.

> The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law, "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [it] may find in favor of the party who has the burden to persuade the [jury] of the fact's existence.'"

Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622, 124 L. Ed. 2d 539, 113 S. Ct. 2264 (1993) (quoting *In re Winship*, 397 U.S. 358, 371-72, 25 L. Ed. 2d 368, 90 S. Ct. 1068, 51 Ohio Op. 2d 323 (1970) (Harlan, J., concurring) (citation omitted)). The inquiry is simply that of any civil case: whether the plaintiff's evidence is sufficient for a rational factfinder to conclude by a preponderance of the evidence that the employer violated the statute - that "race, color, religion, sex, or national origin was a motivating factor for any employment practice."

A. *PRICE WATERHOUSE*

Although Title VII imposes no special burden of proof on discrimination plaintiffs, some courts have fashioned a heightened burden based not on the statute but on the case that prompted its amendment, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989). We turn to that case. There, the Supreme Court confronted a problem not previously encountered in the statute's twenty-five year history: causation. The issue presented was whether there should be liability where an adverse employment decision was the result of mixed motives. More specifically, the trial court found that the failure to select Ann Hopkins for partner at an accounting firm was motivated both by legitimate concerns about her interpersonal skills and by "an impermissibly cabined view of the proper behavior of women." 490 U.S. at 236-37.

All nine justices essentially agreed that liability was inappropriate where the employer would have made the same decision absent sex discrimination - in other words, the illegitimate factor was not a "but for" cause - but they divided over the nuances of the burden of proof. Four justices agreed that "when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." *Id.* at 258 (plurality opinion). These justices made clear that when "an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex." *Id.* at 241. But, the employer could escape liability through the "same decision"

affirmative defense. The dissent criticized the plurality for "its shift to the defendant of the burden of proof," *id.* at 281 (Kennedy, J., dissenting), and argued that the plaintiff should have to prove, by a preponderance of the evidence, that discrimination was the "but for" cause of the challenged action. In response, the plurality emphasized that it offered the defendant an affirmative defense to liability only *after* the plaintiff established that discriminatory animus played a role in the challenged employment action:

> Since we hold that the plaintiff retains the burden of persuasion on the issue whether gender played a part in the employment decision, the situation before us is not ... one of "shifting burdens" .... Instead, the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another.

Id. at 246. Regardless of nomenclature, the plurality agreed that if the employer showed a lack of "but for" causation, then that showing precluded liability.

Justice O'Connor and Justice White each wrote separately, concurring in the judgment only. Justice White relied on *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977), a First Amendment case holding that a showing that constitutionally protected conduct had been a "motivating factor" in an employment decision was sufficient to shift the burden to the state to prove the absence of causation. *Price*

Waterhouse, 490 U.S. at 258-59 (White, J., concurring in the judgment). He found it unnecessary to parse the semantic distinction whether "the *Mt. Healthy* approach is 'but-for' causation in another guise or creates an affirmative defense." *Id.* at 259. Justice O'Connor traced the burdenshifting approach back to venerable tort cases such as *Summers v. Tice, 33 Cal.* 2d 80, 199 P.2d 1, 3-4 (Cal. 1948). *Price Waterhouse*, 490 U.S. at 263-64 (O'Connor, J., concurring in the judgment).

Justice O'Connor had further gatekeeping concerns about when what she considered to be a special "burden shift" might be invoked, thus permitting the plaintiff to make less than the full showing necessary for a statutory violation:

> I believe there are significant differences between shifting the burden of persuasion to the employer in a case resting purely on statistical proof as in the disparate impact setting and shifting the burden of persuasion in a case like this one, where an employee has demonstrated by direct evidence that an illegitimate factor played a substantial role in a particular employment decision.

Id. at 275. It was in this context that she discussed a need for "direct evidence" to show that the employer's "decisional process has been substantially infected by discrimination" before the special burden shift would be triggered. *Id.* at 269-70. Because it was arguably the "narrowest ground" for the decision, Justice O'Connor's one-justice concurring opinion was considered by some to be the controlling analysis. *Fernandes v. Costa Bros. Masonry*, 199 F.3d 572,

580 (1st Cir. 1999); *but see Thomas v. Nat'l Football League Players Ass'n*, 327 U.S. App. D.C. 348, 131 F.3d 198, 203 (D.C. Cir. 1997) ("Justice O'Connor's concurrence was one of six votes supporting the Court's judgment ..., so that it is far from clear that [it] should be taken as establishing binding precedent."), *as vacated in part on reh'g*, 1998 U.S. App. LEXIS 3634, 1998 WL 1988451 (D.C. Cir. Feb. 25, 1998); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir. 1992) ("'Direct evidence' was *not* a requirement imposed by the majority in *Price Waterhouse.*").

B. 1991 CIVIL RIGHTS ACT AMENDMENTS TO TITLE VII

Congress quickly responded to *Price Waterhouse* and a handful of other Supreme Court employment discrimination decisions with the introduction of the Civil Rights Act of 1990, which targeted "the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions." H.R. Conf. Rep. No. 101-856, at 1 (1990). Although the 1990 legislation ultimately floundered, an amended version, with much of the text intact, became the Civil Rights Act of 1991, which expressly overruled the basic premise that an employer could avoid all liability under Title VII by establishing the absence of "but for" causation.

Now, under Title VII, the use of a prohibited characteristic (race, color, religion, sex, or national origin) as simply "a motivating factor" in an employment action is unlawful. 42 U.S.C. § 2000e-2(a)(1). Congress did, however, add one safety valve: an employer can escape damages and orders of reinstatement, hiring, promotion and

the like - but not attorney's fees or declaratory or injunctive relief - by proving the absence of "but for" causation as an affirmative defense. *Id.* § 2000e-2(m). To the extent that there was confusion after *Price Waterhouse* - semantic or otherwise - with respect to burden shifting, the amendment clarified (1) that a Title VII violation is established through proof that a protected characteristic was "a motivating factor" in the employment action and (2) that the employer's "same decision" evidence serves as an affirmative defense with respect to the scope of remedies, not as a defense to liability.

The legislative history evinces a clear intent to overrule *Price Waterhouse*. In a subsection titled "The Need to Overturn *Price Waterhouse*," the report accompanying the 1991 Civil Rights Act reflects congressional concern that the "inevitable effect of the *Price Waterhouse* decision [was] to permit prohibited employment discrimination to escape sanction under Title VII." H.R. Rep. No. 102-40(I), at 46 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 584. The report elaborates:

> When Congress enacted the Civil Rights Act of 1964, it precluded all invidious consideration of a person's race, color, religion, sex or national origin in employment. The effectiveness of Title VII's ban on discrimination on the basis of race, color, religion, sex or national origin has been severely undercut by the recent Supreme Court decision in *Price Waterhouse v. Hopkins*.

Id. at 45. We do not disagree with those courts that have noted that the legislative history does not address Justice

O'Connor's "direct evidence" comment. *See, e.g., Watson v. Southeastern Pa. Transp. Auth.*, 207 F.3d 207, 218-19 (3d Cir. 2000), *cert. denied*, 531 U.S. 1147, 148 L. Ed. 2d 961, 121 S. Ct. 1086(2001).[2] What the history does show beyond doubt, however, is that the premise for Justice O'Connor's comment is wholly abrogated: No longer may "employers' discriminatory conduct escape[]liability," H.R. Rep. 40(I) at 47, simply by showing other sufficient causes. Consequently, there is no longer a basis for any special "evidentiary scheme" or heightened standard of proof to determine "but for" causation.

C. "DIRECT EVIDENCE"

Following *Price Waterhouse* and the Civil Rights Act of 1991, much has been made of Justice O'Connor's passing reference to "direct evidence." Indeed, the reference has spawned a virtual cottage industry of litigation over the effect and meaning of the phrase. It is unnecessary, however, to get mired in the debate over whether Justice O'Connor's opinion was controlling or not because the resolution to this conundrum lies in the 1991 amendments.

Justice O'Connor's reference must be interpreted in light of the Court's understanding at the time of *Price Waterhouse*, namely, that "but for" causation was factored into proof of a Title VII violation, either as an affirmative

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[2] For a thorough analysis concluding that the legislative history is unhelpful on the "direct evidence" requirement, see Benjamin C. Mizer, Note, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 Mich. L. Rev. 234, 256-60 (2001).

defense (plurality) or as part of the plaintiff's proof (dissent). Justice O'Connor wrote separately in part to "express [her] views as to when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered." *Price Waterhouse*, 490 U.S. at 262. Her reference to "direct evidence" was intertwined with her concern about a scheme that shifted the burden on the question of liability from the employee to employer, albeit through an affirmative defense. The 1991 Act eliminated any confusion about burden-shifting and the proof necessary for a Title VII violation, so it is not surprising that courts have had trouble converting Justice O'Connor's reference into a legal standard under the new statutory provision.

The resulting jurisprudence has been a quagmire that defies characterization despite the valiant efforts of various courts and commentators. Within circuits, and often within opinions, different approaches are conflated, mixing burden of persuasion with evidentiary standards, confusing burden of ultimate persuasion with the burden to establish an affirmative defense, and declining to acknowledge the role of circumstantial evidence. We see no need to get bogged down in this debate. Rather, based on the language of the statute - which requires proof of only "a motivating factor" and does not set out any special proof burdens - we conclude that Congress did not impose a special or heightened evidentiary burden on the plaintiff in a Title VII case in which discriminatory animus may have constituted one of two or more reasons for the employer's challenged actions. 42 U.S.C. § 2000e-2(m).

Id. This approach is consistent with recent Supreme Court cases underscoring that no special pleading or proof hurdles may be imposed on Title VII plaintiffs. For example, in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 997-99, 152 L. Ed. 2d 1 (2002), the Court struck down judicially imposed heightened pleading standards. Just two years earlier, in *Reeves*, 530 U.S. at 148, it declined to require independent evidence of discrimination in addition to prima facie evidence and sufficient evidence to rebut pretext. Instead, the Court emphasized that the jury determines the ultimate question of liability. Sticking to the statutory wording, in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80-81, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998), the Court rejected various circuits' special requirements for same-sex sexual harassment cases. *Finally, in Burlington Industries, Inc. v. Ellereth*, 524 U.S. 742, 752-53, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998), the Court quashed distinctions between "quid pro quo" and "hostile environment" liability structures in harassment cases. Here, too, we believe that we are well advised to follow the statute instead of engaging in judicial invention.

To understand why we should stick to the statute rather than divine a new standard of proof, it is instructive to look at the state of circuit law in this area. Judge Selya has made an attempt to categorize the circuits' approaches in a framework that provides a useful overview. *Fernandes*, 199 F.3d at 582. He first discusses the "classic" position, an approach that takes the definition of "direct evidence" from the dictionary: "'evidence, which if believed, proves existence of fact in issue *without inference or presumption*.'" *Rollins v. Tech- South, Inc.*, 833 F.2d 1525, 1529 n. 6 (11th Cir. 1987) (quoting *Black's Law Dictionary* 413 (5th ed.

1979)) (emphasis in *Rollins)*. Judge Selya notes that "only the Fifth and Tenth Circuits cling consistently to this view, [but] other tribunals have embraced it periodically." *Fernandes*, 199 F.3d at 582.

Next is the "animus plus" position, which basically requires that the plaintiff prove a particularly strong case - more than ordinarily would be required for an inference of discrimination to be permissible. Our review indicates that a majority of courts that impose a "direct evidence" requirement adhere to this view, either explicitly or implicitly. *See, e.g., Thomas*, 131 F.3d at 204 (defining direct evidence as "a relationship between proof and incidents"); *Fernandes*, 199 F.3d at 580 (explaining the function of direct evidence as restricting the mixed-motive analysis "to those infrequent cases in which a plaintiff can demonstrate [discrimination] with a high degree of assurance"); *Fuller v. Phipps*, 67 F.3d 1137, 1143 (4th Cir. 1995) (holding that the determination "hinges on the strength of the evidence"); *Bass v. Bd. of County Comm'rs*, 256 F.3d 1095, 1105 (11th Cir. 2001) (requiring, under the rhetoric of banning circumstantial evidence, "only the most blatant remarks") (citation omitted). Judge Selya places the Fourth, D.C., Ninth,[3] and Third circuits in this camp, not without hesitation, and indicates that other circuits indicate "occasional approval" of this approach. *Fernandes*, 199 F.3d at 582.

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[3] We view this categorization of Ninth Circuit law as misplaced. The case cited in *Fernandes, Lambert v. Ackerley*, 180 F.3d 997, 1008-09 (9th Cir. 1999) (en banc), does not adopt the "animus plus" approach.

Finally, there is the "animus" position, which simply requires evidence that bears on the alleged discriminatory animus or, put even more simply, evidence of discrimination. Judge Selya places the Second Circuit, the Eighth Circuit "intermittently," and other stray cases, in this camp. *Id.*

Other courts and commentators have had even more difficulty articulating an order to the chaos. *See, e.g., Thomas*, 131 F.3d at 205 (citing Fifth, Tenth, and Eleventh Circuits as taking "direct evidence" to mean non-inferential); Christopher Y. Chen, Note, *Rethinking the Direct Evidence Requirement: A Suggested Approach in Analyzing Mixed-Motives Discrimination Claims*, 86 Cornell L. Rev. 899, 908-15 (2001); Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 Mercer L. Rev. 651, 663 (2000) ("The line between *McDonnell Douglas* and *Price Waterhouse* is very murky.").

Indeed, within circuits, cases sometimes take different approaches. *See Wright v. Southland Corp.*, 187 F.3d 1287, 1294 (11th Cir. 1999) (recognizing intra-circuit splits). For example, the First Circuit first embraced the animus plus approach in *Fernandes*, 199 F.3d at 580, but recently implied in *Weston-Smith v. Cooley Dickinson Hospital*, 282 F.3d 60, 64 (1st Cir. 2002), that it took the classic approach. The Eleventh Circuit first allowed "broad statements" of discriminatory attitude, *Burrell v. Bd. of Trustees of Ga. Military Coll.*, 125 F.3d 1390, 1394 n. 7 (11th Cir. 1997), but later concluded that only statements related to the decisionmaking process were sufficient to overcome the special "direct evidence" hurdle, *Bass*, 256 F.3d at 1105.

In a carefully considered decision issued shortly after the Civil Rights Act of 1991, the Second Circuit held that direct evidence simply meant evidence sufficient to permit the trier of fact to conclude that an illegitimate characteristic was a motivating factor in the challenged decision under Title VII. *Tyler*, 958 F.2d at 1185. However, a few months later, a different panel held that discrimination victims face the special hurdle of presenting "evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude." *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992). Although *Ostrowski* squarely rejected a definition of "direct evidence" as non-circumstantial evidence, *id.* at 181, some cases quote it as though it supported the noncircumstantial requirement. *See, e.g., Cronquist v. City of Minneapolis*, 237 F.3d 920, 925 (8th Cir. 2001). *Ostrowski* was an age discrimination case, but has been widely applied in the Title VII context, apparently without analysis of the difference in the statutes. *See, e.g., Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2d Cir. 1997).

In the Tenth Circuit, the court initially declined to impose a heightened "direct evidence" requirement, only to be ignored by a panel ruling six months later. *Compare Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 553 (10th Cir. 1999) ("A mixed motive instruction is ... appropriate in any case where the evidence is sufficient to allow a trier to find both forbidden and permissible motives." (citation and internal quotation marks omitted)) *with Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999) (imposing a "direct evidence" requirement as classically

defined, and excluding "statements of personal opinion, even when reflecting a personal bias").

We believe that the best way out of this morass is a return to the language of the statute, which imposes no special requirement and does not reference "direct evidence." To the extent that courts are using "direct evidence" as a veiled excuse to substitute their own judgment for that of the jury, we reject that approach. In so doing, we follow the Second Circuit's *Tyler* case, 958 F.2d at 1184-85, the Eleventh Circuit's *Wright* case, 187 F.3d at 1301-02, the Tenth Circuit's approach in *Medlock*, 164 F.3d at 553, and the Eighth Circuit in *Schleiniger v. Des Moines Water Works*, 925 F.2d 1100, 1101 (8th Cir. 1991). We also agree with other courts to the extent that they hold that non circumstantial evidence is not the magical threshold for Title VII liability. *See, e.g., Thomas*, 327 U.S. App. D.C. at 355 (collecting cases).

Put simply, the plaintiff in any Title VII case may establish a violation through a preponderance of evidence (whether direct or circumstantial)[4] that a protected characteristic played "a motivating factor." Like the Supreme Court, "we think it generally undesirable, where holdings of

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[4] The general rule bears repeating: in proving a case, circumstantial evidence "is weighed on the same scale and laid before the jury in the same manner as direct evidence." *United States v. King*, 552 F.2d 833, 845 (9th Cir. 1976) (citing *Holland v. United States*, 348 U.S. 121, 139-40 (1954)). In other words, "circumstantial evidence is not inherently less than probative than direct evidence." *United States v. Cruz*, 536 F.2d 1264, 1266 (9th Cir. 1976) (citation and internal quotation marks omitted).

the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993). The "direct evidence" quagmire results from just such a misdirected inquiry, and we decline to be drawn in.

D. THE FRAMEWORK FOR PROVING A TITLE VII VIOLATION

In addition to the confusion over "direct evidence," there has been considerable misunderstanding regarding the relationship among the *McDonnell Douglas* burden-shifting analysis (sometimes referred to as "pretext" analysis), which primarily applies to summary judgment proceedings, and the terms single-motive and mixed-motive, which primarily refer to the theory or theories by which the defendant opposes the plaintiff's claim of discrimination. The short answer is that all of these concepts coexist without conflict.

Caesars' argument in favor of a higher evidentiary burden is emblematic of the confusion. Caesars maintains that without special proof, "any plaintiff who is able to establish a prima facie showing in a pretext case would qualify for a mixed-motive instruction, conflating the two categories of cases." This argument mistakenly juxtaposes the pretrial *McDonnell Douglas* legal framework and the "mixed-motive" characterization.

To place *McDonnell Douglas* in perspective, it must be remembered that the current form of Title VII is the result of twenty-seven years of dynamic exchange between the Supreme Court and Congress, working toward a framework

that provides a remedy for barriers of discrimination and inequality in the workplace. Early in the statute's history, the Supreme Court distinguished disparate impact claims under Title VII § 703(a)(2) from disparate treatment claims under § 703(a)(1). Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 703(a). Disparate treatment claims require the plaintiff to prove that the employer acted with conscious intent to discriminate. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805-06, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973) (distinguishing *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971)).

McDonnell Douglas was the first in a series of cases dealing with the difficulties of proving intent to discriminate in a disparate treatment context. The Supreme Court detailed circumstances sufficient to support an inference of discrimination, the now-eponymous *McDonnell Douglas* "prima facie case and burden-shifting paradigm."[5] The Court recently reaffirmed that "the precise requirements of a prima facie case can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic.'" *Swierkiewicz*, 122 S. Ct. at 995 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978)). This legal proof structure is a tool to assist

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[5] This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, 411 U.S. at 802.

plaintiffs at the summary judgment stage so that they may reach trial.

As the Supreme Court elaborated a few years after *McDonnell Douglas*, the prima facie case "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine,* 450 U.S. at 254. Therefore, "we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Id.* (citation and internal quotation marks omitted). *Burdine* clarified, however, that the plaintiff need not rely on this presumption: "She may succeed ... either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256.

Throughout these cases and those that followed, the court reaffirmed the canons of proof: the plaintiff retains the "ultimate burden of persuading the court that she has been the victim of intentional discrimination," *id.* at 256; the question comes down to whether she has made her case. *See also Hicks*, 509 U.S. at 511; *Reeves*, 530 U.S. at 142-49.

The plaintiff may make out a prima facie case - which may, admittedly, be a weak showing - that entitles her to a commensurately small benefit, a transitory presumption of discrimination: the burden of *production* only shifts briefly to the employer to explain why it took the challenged action, if not based on the protected characteristic. In practice, employers quickly rebut the presumption and it "drops from the case." *Burdine*, 450 U.S. at 256 n. 10; *see also* Deborah C. Malamud, *The Last Minuet: Disparate Treatment after*

Hicks, 93 Mich. L. Rev. 2229, 2302-04 (1995). The burden of production then shifts back to the plaintiff to introduce evidence from which the factfinder could conclude that the employer's proffered reason was pretextual. The burden of *persuasion* always remains with the employee to prove the ultimate Title VII violation - unlawful discrimination.

It is important to emphasize, however, that nothing compels the parties to invoke the *McDonnell Douglas* presumption. *United States Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 717, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983). Evidence can be in the form of the *McDonnell Douglas* prima facie case, or other sufficient evidence - direct or circumstantial - of discriminatory intent. 460 U.LS. at 714 & n. 3, 717. Thus, although *McDonnell Douglas* may be used where a single motive is at issue, this proof scheme is not the exclusive means of proof in such a case. Indeed, it also might be invoked in cases in which the defendant asserts a "same decision" defense to certain remedies, a circumstance in which mixed motives are at issue.

Regardless of the method chosen to arrive at trial, it is not normally appropriate to introduce the *McDonnell Douglas* burden-shifting framework to the jury.[6] At that stage,

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[6] The presumption is thus what has been termed a "bursting bubble" presumption. In one limited circumstance, the presumption retains vitality at trial: where there is no rebuttal by the employer, but the plaintiff's prima facie case is in factual dispute. The jury then determines whether the prima facie case is established. If it is, the jury must find discrimination. *Hicks*, 509 U.S. at 509-10.

the framework "unnecessarily evades the ultimate question of discrimination *vel non*." *Aikens*, 460 U.S. at 714.

Once at the trial stage, the plaintiff is required to put forward evidence of discrimination "because of" a protected characteristic.[7] After hearing both parties' evidence, the district court must decide what legal conclusions the evidence could reasonably support and instruct the jury accordingly. This determination is distinct from the question of whether to invoke the *McDonnell Douglas* presumption, which occurs at a separate, earlier stage of proceedings, involves summary judgment rather than jury instructions, and is unrelated to the number of possible motives for the challenged action. Instead, the choice of jury instructions depends simply on a determination of whether the evidence supports a finding that just one - or more than one - factor actually motivated the challenged decision. Justice White, in his concurring opinion in *Price* Waterhouse, succinctly described how the type of evidence presented affects the question facing the jury:

> In [single-motive] cases, "the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision." In mixed-motive cases, however, there is no one "true" motive behind the decision.

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[7] As the Supreme Court has observed, a case need not be characterized or labeled at the outset. Rather, the shape will often emerge after discovery or even at trial. Similarly, the complaint itself need not contain more than the allegation that the adverse employment action was taken because of a protected characteristic. *See Price Waterhouse*, 490 U.S. at 247 n. 12 (plurality opinion).

> Instead, the decision is a result of multiple factors, at least one of which is legitimate.

Price Waterhouse, 490 U.S. at 260 (White, J., concurring in the judgment) (citation omitted).[8] Following the 1991 amendments, characterizing the evidence as mixed-motive instead of single-motive results only in the availability of a different defense, a difference which derives directly from the statutory text, not from judicially created proof structures.

As a practical matter, the question of how many motives the evidence reasonably supports affects the jury instructions as follows:

If, based on the evidence, the trial court determines that the only reasonable conclusion a jury could reach is that discriminatory animus is the *sole* cause for the challenged employment action or that discrimination played *no* role at all in the employer's decisionmaking, then the jury should be instructed to determine whether the challenged action was taken "because of" the prohibited reason. 42 U.S.C. § 2000e-2(a); *see also Oncale*, 523 U.S. at 79-80 (emphasizing "because of" standard). If the jury determines that the employer acted because of discriminatory intent, the employee prevails and may receive the full remedies available under Title VII; if not, the employer prevails. In such cases the employer does not benefit from the "same decision"

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[8] Although Justice White used the term "pretext cases" in the first sentence of this passage, it is clear from the context that he was referring to single-motive cases, including those involving pretext. *Id.* at 260.

defense, which, if successful, significantly limits the employee's remedies.

In contrast, in cases in which the evidence could support a finding that discrimination is one of two or more reasons for the challenged decision, at least one of which may be legitimate, the jury should be instructed to determine first whether the discriminatory reason was "a motivating factor" in the challenged action. If the jury's answer to this question is in the affirmative, then the employer has violated Title VII. However, if the jury then finds that the employer has proved the "same decision" affirmative defense by a preponderance of the evidence, 42 U.S.C. § 2000e-5(g)(2)(B), the employer will escape the imposition of damages and any order of reinstatement, hiring, promotion, and the like, and is liable solely for attorney's fees, declaratory relief, and an order prohibiting future discriminatory actions.

Regardless of what kind of instructions are given, we emphasize that there are not two fundamentally different types of Title VII cases. In some cases, the employer may be entitled to the "same decision" affirmative defense instruction. In others, it may not. The employee's ultimate burden of proof in all cases remains the same: to show by a preponderance of the evidence that the challenged employment decision was "because of" discrimination.

Finally, we turn to the question of where the concept of pretext fits in this framework. Although cases in which the *McDonnell Douglas* framework is applied are sometimes referred to as "pretext cases," and we have no wish to change a quarter century of usage, it should be noted that questions of pretext may arise in any Title VII case, regardless of

whether it is analyzed under *McDonnell Douglas*. Cases in which the dispute is only over whether or not the employer possessed the discriminatory motive alleged need not involve pretext, although they often do. For example, if the plaintiff chooses not to invoke the *McDonnell Douglas* framework, the employer need not proffer any explanation for the challenged action, but may simply require the plaintiff to prove her case of discrimination. Nor is the concept of pretext alien to cases in which an employer asserts a "same decision" or "but for" defense. For example, one of the employer's purportedly legitimate reasons may be pretextual. On the other hand, another may not. As Justice O'Connor recently explained in writing for the Court: "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination ...." *Reeves*, 530 U.S. at 147.

To summarize: *McDonnell Douglas* and "mixed-motive" are not two opposing types of cases. Rather, they are separate inquiries that occur at separate stages of the litigation. Nor are "single-motive" and "mixed-motive" cases fundamentally different categories of cases. Both require the employee to prove discrimination; they simply reflect the type of evidence offered. Where the employer asserts that, even if the factfinder determines that a discriminatory motive exists, the employer would in any event have taken the adverse employment action for other reasons, it may take advantage of the "same decision" affirmative defense. The remedies will differ if the employer prevails on that defense. With this framework in mind, we turn to the evidence in Costa's case.

II. MIXED-MOTIVE INSTRUCTION AND SUFFICIENCY OF THE EVIDENCE

Although Caesars invokes the *McDonnell Douglas* analysis, that framework is not instructive at this stage of the case. *See Aikens*, 460 U.S. at 713-14. Rather, we are asked to review the district court's decision to give a mixed-motive instruction and the sufficiency of the evidence to support the jury's verdict, as challenged in a motion for judgment as a matter of law made at the close of the evidence.

A. THE MIXED-MOTIVE JURY INSTRUCTION

We must first determine the applicable standard of review. The standards are well known and often stated: we generally review the formulation of instructions for abuse of discretion, but whether an instruction misstates the law is a legal issue reviewed de novo. *See, e.g., Voohries-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 713 (9th Cir. 2001). At issue here is whether the evidence can be characterized as establishing multiple motives, and thus warranting the affirmative defense. Because this evaluation is, at bottom, an evaluation of the evidence, an abuse of discretion standard is appropriate.

The district court submitted both claims - the termination and the conditions of employment - to the jury. It first instructed the jury that:

> The plaintiff has the burden of proving each of the following by a preponderance of the evidence:

> 1. Costa suffered adverse work conditions, and
>
> 2. Costa's gender was a motivating factor in any such work conditions imposed upon her. Gender refers to the quality of being male or female.

If you find that each of these things has been proved against a defendant, your verdict should be for the plaintiff and against the defendant. On the other hand, if any of these things has not been proved against a defendant, your verdict should be for the defendant.

The jury was next given the following mixed-motive instruction, which is central to this appeal:

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the

> defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

Caesars first intimates that the wording of the mixed motive instruction was invalid because it inappropriately implied a judicial determination that sex was in fact a motivation for the challenged treatment. Caesars, however, waived any objection to the form of the instruction by conceding at trial that it was "a reasonable statement of the mixed motive instruction." Fed. R. Civ. P. 51; *Shaw v. City of Sacramento*, 250 F.3d 1289, 1293 (9th Cir. 2001) (as amended).

As for Caesars' main contention, we are not persuaded that the district court erred in giving a mixed-motive instruction. In many respects, Costa's case presents a typical Title VII case in which a plaintiff alleges that she was discharged or disciplined for a discriminatory reason and the employer counters that the reason for its action was entirely different. The evidence did not require the jury to believe that discrimination was the only motive, nor that Caesars' stated reasons were all bogus or pretextual. For example, there was evidence that Hallett, Stewart, and other decisionmakers were legitimately concerned about Costa's behavior and altercations with co-workers, but there was likewise significant evidence that they would not have taken such drastic disciplinary measures against a man. Similarly, the jury could reasonably have concluded that the overtime assignment system was in a state of disarray that allowed favoritism and that one element of that favoritism was preferential treatment for male workers. The fact is that Caesars may have had legitimate reasons to terminate Costa. Indeed, unlike in many Title VII

cases, Costa does not dispute many of the events that took place. Nor does she wholly discount that these events may have been part of the basis for her discipline and termination. Nonetheless, the wide array of discriminatory treatment is sufficient to support a conclusion that sex was also a motivating factor in the decision-making process. Thus, the district court did not abuse its discretion in giving a mixed-motive instruction.

B. SUFFICIENCY OF THE EVIDENCE

We review de novo Caesars' challenge to the district court's denial of its Rule 50(b) motion for judgment as a matter of law. *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1226 (9th Cir. 2001), *cert. denied*, 151 L. Ed. 2d 563, 122 S. Ct. 645 (2001). At the outset, we note that the standard that Caesars must meet is very high. We can overturn the jury's verdict and grant such a motion only if "'there is no legally sufficient basis for a reasonable jury to find for that party on that issue.'" *Reeves*, 530 U.S. at 149 (quoting Fed. R. Civ. P. 50(a)). Because we "may not substitute [our] view of the evidence for that of the jury," *Johnson*, 251 F.3d at 1227, we neither make credibility determinations nor weigh the evidence and we must draw all inferences in favor of Costa, *Reeves*, 530 U.S. at 150 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)). The Supreme Court cautions us to "disregard all evidence favorable to the moving party that the jury is not required to believe." 530 U.S. at 151. This high hurdle recognizes that credibility, inferences, and factfinding are the province of the jury, not this court.

1. LIABILITY DETERMINATION

Applying the analysis outlined above, we begin, not surprisingly, with the text of the statute, asking whether a reasonable jury could conclude that sex was "a motivating factor" in the challenged actions. The discriminatory treatment ran the gamut from disparate discipline and "stacking" Costa's personnel file to stalking her, singling her out for different treatment in the workplace, and discriminating against her in the assignment of overtime. In the final analysis, the jury heard testimony from Costa and fifteen other witnesses. Testimony included the chronology of escalating discipline and targeting of Costa, co-workers who identified discrimination because of sex, and multiple examples of disparate treatment purposefully directed at Costa because of her sex. Lending credence to the claim that sex was a motivating factor in her treatment, Costa also offered evidence of sexual stereotyping and sexual epithets. Viewing the evidence from her perspective and drawing all inferences in her favor, we cannot conclude that "there is no legally sufficient evidentiary basis for a reasonable jury," *Reeves*, 530 U.S. at 135, 149, to find that intentional discrimination on the basis of sex was "a motivating factor" in subjecting Costa to a number of adverse employment actions, and culminating in her termination.

Costa presents overwhelming evidence that she was more harshly treated than her male coworkers. Because she was the only woman in an otherwise all-male unit, linking the differential treatment to her sex was not a difficult leap. The jury could easily infer that sex was one of the reasons Costa was singled out for negative treatment. Indeed, the evidence is sufficiently strong that for many of the incidents the jury

might have concluded that sex was the only reason for the adverse action. "Proof of discriminatory motive ... can in some situations be inferred from the mere fact of differences in treatment." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977). Mindful of the Supreme Court's admonishment to "draw all reasonable inferences in favor of" the prevailing party, *Reeves*, 530 U.S. at 151-52, we conclude that the jury was entitled to view the differential treatment here as evidence of discrimination.

In a case quite similar to this one, *Sischo-Nownejad v. Merced Community College District*, 934 F.2d 1104, 1112 (9th Cir. 1991), we held that a plaintiff had made a showing sufficient to create a factual issue. The plaintiff there, the only woman holding a full-time faculty appointment in the art department of a community college, alleged that she was denied a choice as to which courses to teach and that she was deprived of supplies, whereas male co-workers were not. The college was also nonresponsive to reasonable requests for leave and disciplined her for petty offenses. *Id.* at 1107-08. Similarly, Costa presented evidence that she was denied overtime and medical leave where male co-workers were not. Her work was supervised more intensely than that of male colleagues. She was reprimanded for minor infractions while men, sitting right next to her and engaging in the same conduct, were not. Thus, this is a case where "the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose." *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 311-12, 13 L. Ed. 2d 855, 85 S. Ct. 955 (1965) ("Where many have broken a shop rule, but only union leaders have been discharged, the Board need not listen

too long to the plea that shop discipline was simply being enforced.").

The most prominent example of this differential treatment was Caesars' decision to terminate Costa for an incident that netted her male co-worker only a five-day suspension. Costa's claim that she was shoved against an elevator wall and sustained bruises from the altercation is not one to be taken lightly. The excuse that the management could not figure out whom to believe - Costa or Gerber - is questionable given the strong corroboration of Costa's story and the inconsistencies in Gerber's account. The explanation offered by Caesars was lacking in several respects, and the jury was certainly not required to believe it. The jury was entitled instead to infer that Costa was fired, while Gerber was only suspended, because Costa was a woman. This is precisely the circumstance in which we credit the inference in Costa's favor.

Finally, the jury could easily have believed that Costa's record was itself largely a result of discrimination because of repeated incidents of unfair discipline that accumulated over time. For example, her supervisor's decision to backfill the records with prior alleged misconduct supports such a conclusion. *See Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1291 (9th Cir. 1991). In *Pogue*, we held that the Department of Labor acted, at least in part, with impermissible retaliatory motives, because the employee's "prior work performance and defiant attitude cited by the Secretary could reasonably be attributed to the Navy's admitted retaliation." *Id.* Moreover, "Pogue presented evidence, relied on by the ALJ, that the disciplinary actions

taken against her were substantially disproportionate to discipline imposed by the Navy in the past." *Id.*

Caesars presents us with alternate rationales for the termination, and asks us to hold as a matter of law that Costa's conduct was the only element motivating its decision. We decline this invitation. Perhaps the disparities in how Costa was treated were in part because supervisor Hallett disliked her as a person and not as a woman. Perhaps they were in part because Costa had a history of "not getting along" with her co-workers, although there was contrary testimony. What the jury implicitly concluded, however, was that the disparities were also in part because she was a woman. In so finding, the jury did not necessarily reject all of Caesars' legitimate complaints about Costa. But even if it credited certain of these explanations, in following the jury instructions, it reasonably found that sex was "a motivating factor" in the termination. The evidence of differential treatment was so persuasive and long-standing that the judgment may be upheld on this ground alone. "It is primarily the province of the jury to determine what inferences can be drawn from circumstantial evidence. So long as the evidence can reasonably support an inference of discrimination, the court should not upset the jury's decision." *Norton v. Sam's Club*, 145 F.3d 114, 119 (2d Cir. 1998).

We turn next to Costa's evidence that she was chastised for failing to conform to the role stereotypically assigned to women. The jury heard remarks that could reasonably be viewed to "stem[]from an impermissibly cabined view of the proper behavior of women." *Price Waterhouse*, 490 U.S. at 236-37. She was told that she did not deserve overtime because she did not have a family to

support. In her view, the implication was that she was not *a man* with a family to support. The jury could interpret this as a comment directed to her as a woman, indicating that the discriminatory action, a failure to assign overtime, was based on her not being a male breadwinner. The Seventh Circuit held similar facts to be evidence of sex stereotyping. *See Bruno v. City of Crown Point*, 950 F.2d 355, 362 (7th Cir. 1991) (holding that jury could believe employer held sexual stereotypes when female paramedic applicant was the only one asked about family responsibilities).

She was also disciplined in circumstances that the jury could reasonably infer amounted to telling her to "walk more femininely, talk more femininely." *Price Waterhouse*, 490 U.S. at 235. For example, Costa was told "you got more balls than the guys." And yet, arguably when she acted tough like the guys, she received harsher discipline rather than an "atta boy" reinforcement. At trial, Caesars' consistent objection to Costa as an employee was that she was "strong-willed" and "opinionated," a view that the jury could have reasonably interpreted as gender stereotyping. As was clear from her testimony, Costa sought no special treatment, only equal treatment.

Finally, reinforcing the inference that her gender motivated the adverse view of her character, Costa presented evidence of sexual language and epithets directed to her. Specifically, Costa presented evidence that Hallett, the very supervisor who signed her discharge, had declared an intention on several occasions to "get rid of that bitch." Whether this term is part of the everyday give-and-take of a warehouse environment or is inherently offensive is not for us to say. Instead, we simply conclude that the jury could

interpret it here to be one piece of evidence among many, a derogatory term indicating sex-based hostility.[9] In addition, managers encouraged sex-based epithets directed at Costa by disciplining her for failing to tolerate the slurs silently. Admittedly, Costa worked in a rough and tumble and often vulgar environment. But the prevalence of race or sex-based slurs does not excuse them. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 807 (9th Cir. 2001), *cert. denied*, 152 L. Ed. 2d 623, 122 S. Ct. 1609 (2002).

As we explained in *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463-64 (9th Cir. 1994), when abuse directed at women "centers on the fact that they [are] females," a jury may infer discrimination. In *Steiner*, a hostile environment case, a supervisor "was indeed abusive to men, but ...his abuse of women was different. It relied on sexual epithets, offensive, explicit references to women's bodies and sexual conduct." *Id.* at 1463 (citing *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 19, 126 L. Ed. 2d 295, 114 S. Ct. 367

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[9] *See Galloway v. Gen'l Motors Serv. Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996) (holding that the legal meaning of the word "bitch" is context-specific; "The word 'bitch' is sometimes used as a label for women who possess such 'woman faults' as 'ill-temper ...,' and latterly as a label for women considered by some men to be too aggressive or careerist." (citation omitted)), *overruled in part on other grounds by AMTRAK v.* Morgan,153 L. Ed. 2d 106, 122 S. Ct. 2061 (2002); *Kriss v. Sprint Communications Co.*, 58 F.3d 1276, 1281 (8th Cir. 1995) (noting that use of the word "bitch" might be evidence of discrimination in some contexts); *Neuren v. Adduci, Mastriani, Meeks & Schill*, 310 U.S. App. D.C. 82, 43 F.3d 1507, 1513 (D.C. Cir. 1995) ("This pejorative term may support an inference that an employment decision is discriminatory under different circumstances ....").

(1993)). Similarly here, the evidence supports the inference that the abuse directed toward Costa was different in nature and degree.

In the context of this case, we need not decide whether this sexual language is dispositive of discrimination. Rather, this language was simply one more factor for the jury to consider in the face of repeated differential treatment by Hallett and others at Caesars. Viewing the evidence in Costa's favor, the jury could have easily inferred that the use of highly charged and offensive sexual language was simply another means of singling Costa out because she was a woman.

Finally, we detour briefly to address the suggestion that Hallett was somehow incapable of discriminating against Costa because Hallett was herself a woman. This argument was resoundingly rejected by a unanimous Supreme Court in *Oncale*, 523 U.S. at 80-81. In a society where historically discriminatory attitudes about women are "firmly rooted in our national consciousness," *Frontiero v. Richardson*, 411 U.S. 677, 684, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973) (plurality opinion), we cannot discount that the jury perceived Hallett, a former Army officer now placed in a supervisory position in a virtually male-only world, as demonstrating hostility toward Costa as a woman as a means of showing that she was "one of the boys." *See also J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 136-37, 128 L. Ed. 2d 89, 114 S. Ct. 1419 (1994) ("Our nation has had a long and unfortunate history of sex discrimination ....") (quoting *Frontiero*, 411 U.S. at 684). Life was not necessarily easy for Hallett, but that was no excuse for visiting harsh discipline on Costa.

2. AFFIRMATIVE DEFENSE - "SAME DECISION"

Once the jury found liability on the part of Caesars, it was asked to decide whether the "defendant proved by a preponderance of the evidence that the defendant would have made the same decisions if the plaintiff's gender had played no role in the employment decision." The jury checked the "NO" box. This question on the special verdict form reflects the "same decision" affirmative defense provided in 42 U.S.C. 2000e-5(g)(2)(B); *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 759-60 (9th Cir. 1996).

Caesars, not Costa, has the burden on this question, and we must still filter the evidence in the light most favorable to Costa. Under this lens, much of the evidence of differential treatment removes this question from the realm of the hypothetical and shows what, in fact, Caesars did do when men violated its policies. Costa's infractions may have played a role in her termination. But the evidence also underscores how the documentation of her infractions and discipline stemmed in part from sex discrimination. Based on the extensive testimony, the jury simply did not believe that Caesars would have made the same decision "but for" Costa's sex. There was a substantial basis for the jury to conclude that Caesars did not meet its burden in demonstrating that it would have made the same decision absent consideration of sex.

III. ADMISSIBILITY OF ARBITRATION DECISIONS

Caesars argues that the trial court's exclusion of arbitration decisions, relating to the incident that ultimately triggered Costa's termination, was an abuse of discretion so

prejudicial that a new trial is warranted. The incident that led to Costa's termination was the altercation with Gerber in the elevator. In an arbitration brought pursuant to their collective bargaining agreement, both Costa and Gerber challenged the discipline imposed, to no avail. At the discrimination trial, having successfully argued that hearsay rules blocked Costa's attempt to introduce transcripts of the arbitration hearing, Caesars later sought to introduce the arbitrator's decisions. Costa responded by raising a hearsay objection and arguing that admission of the decisions would be irrelevant because the central issue of the trial - sex discrimination - was not addressed in the arbitration.

Costa is correct that discrimination was not covered by the collective bargaining agreement and was not at issue in the arbitration. Thus, the present case can be distinguished from *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 38, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974), in which the Supreme Court established an employee's right to pursue both Title VII judicial remedies and arbitration "under the nondiscrimination clause of a collective-bargaining agreement." Because we review for abuse of discretion the narrow evidentiary issue before us, we need not address the scope of *Gardner-Denver* or broader issues with respect to the preclusive effects of arbitration on subsequent discrimination claims. *See, e.g, Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991). Other courts have held that district courts have discretion to exclude arbitration awards in similar circumstances. *See, e.g. Jackson v. Bunge Corp.*, 40 F.3d 239, 246 (8th Cir. 1994); *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1259 (10th Cir. 1988); *Perry v. Larson*, 794 F.2d 279, 284-85 (7th Cir. 1986). Under these circumstances, it was not an abuse of discretion for the

district court to exclude the arbitration decisions. *See United States v. Hernandez- Herrera*, 273 F.3d 1213, 1217 (9th Cir. 2001) (standard of review).

IV. PUNITIVE DAMAGES

The jury awarded $100,000 in punitive damages, in addition to the $200,000 in compensatory damages (later remitted to $100,000) and $64,377.74 in backpay. Caesars argues that the jury instruction on punitive damages, though a proper statement of Ninth Circuit law at the time of trial, was in fact in error under the Supreme Court's later ruling in *Kolstad v. American Dental Association*, 527 U.S. 526, 144 L. Ed. 2d 494, 119 S. Ct. 2118 (1999). We agree and accordingly remand for consideration of punitive damages.

We have explained that *Kolstad* provided the employer with a new "good faith" defense, enabling it to escape punitive damages if it can show that the challenged actions were not taken by senior managers and were contrary to the employer's good faith implementation of an effective antidiscrimination policy. *Swinton*, 270 F.3d at 810-11; *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 516 (9th Cir. 2000). *Kolstad* also suggests that "'the court should review the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished.'" 527 U.S. at 543 (quoting 1 L. Schlueter & K. Redden, Punitive Damages § 4.4(B)(2)(a), p. 181 (3d ed. 1995)). Understandably, in view of the then-current Ninth Circuit authority, the instructions here contained no such

considerations, nor were these issues considered by the district court.[10]

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[10] Caesars objected to Instruction Number 15, which was a general vicarious liability instruction:

> A corporation such as Caesars Palace acts through its management and it is responsible for the decisions and actions of its management and supervisory personnel in matters of this kind.

Instruction Number 13 related to punitive damages and read, in relevant part:

> If you find for plaintiff and if you award compensatory damages or nominal damages, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter a defendant and others from committing similar acts in the future.
>
> Plaintiff has the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. You may award punitive damages only if you find that Plaintiff has made a showing beyond the threshold level of intent required for compensatory damages. An award of punitive damages is proper where defendant's illegal acts were willful and egregious, or displayed reckless disregard to plaintiff's rights. Conduct is in reckless disregard of plaintiff's rights if, under the circumstances, it reflects complete indifference to the safety and rights of others.

Initially, we must determine whether Caesars waived the objection to the form of the instruction by failing to raise it at trial. We have discretion to review an instruction despite such a failure to object where a "'solid wall of Circuit authority' would have rendered an objection futile." *Knapp v. Ernst & Whinney*, 90 F.3d 1431, 1438-39 (9th Cir. 1996) (quoting *Robinson v. Heilman*, 563 F.2d 1304, 1307 (9th Cir. 1977) (per curiam)). Consistent with our prior cases in this transitional period, we believe that review is appropriate to determine whether the jury instructions comported with the Supreme Court's command in *Kolstad*. *See Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1291 (9th Cir. 2001); *Swinton*, 270 F.3d at 809-10; *Passantino*, 212 F.3d at 514.

Both parties seek to avoid a remand on the punitive damages issue. Costa argues that the jury's finding of egregious conduct obviates the need to determine good faith; Caesars argues that punitive damages are unavailable as a matter of law. Neither argument prevails. The jury found the conduct "egregious" or reflective of "complete indifference to the safety and rights of others." *Kolstad* held that "egregious" misconduct was probative but not necessary for an award of punitive damages. 527 U.S. at 538. Instead, the question was the employer's "malice" or "reckless indifference" to the employee's federally protected rights. *Id.* at 535-36. The jury's findings, which were well-supported, establish this requisite scienter and the additional, probative factor of egregious misconduct. However, we cannot equate "egregious" misconduct with a lack of "good faith" as a matter of law. Nor can we say that punitive damages are unavailable as a matter of law. We therefore remand for a retrial on the issue of punitive damages in light of *Kolstad*.

AFFIRMED in part; **REVERSED** and **REMANDED** in part. Each party to bear its own costs on appeal.

DISSENT

GOULD, Circuit Judge, with whom KOZINSKI, FERNANDEZ, and KLEINFELD, Circuit Judges, join, dissenting:

I respectfully dissent because the majority does not follow the Supreme Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989), in Title VII mixed motives cases. The majority's analysis is not persuasive and should be corrected because it disregards the holding of *Hopkins* that is reflected in Justice O'Connor's concurring opinion.

In *Hopkins*, the plurality, comprised of four Justices, concluded that an employee should be able to recover under Title VII if gender was "a factor in the employment decision at the moment it was made," 490 U.S. at 241, unless the employer, using objective evidence, could show by a preponderance of the evidence that it would have made the same decision absent the discriminatory motive. *Id.* at 244-45, 252.

Justice White, joined by Justice O'Connor, concurred in the judgment. Justice White thought that the impermissible motive must have been a "substantial factor" in the employer's decision and that the employer need not use "objective evidence" to make its same-decision showing. *Id.* at 259, 261. Justice White would permit a mixed motive test in which the burden is shifted to the employer, but he would

be liberal on the evidence an employer could offer. His view of when such a test should be available, however, is broader than Justice O'Connor's.

Justice O'Connor would allow a plaintiff to use a mixed motive test only in narrow circumstances. In concurrence, Justice O'Connor held that she would require a Title VII plaintiff in a mixed motive case to produce "direct evidence" showing that "decisionmakers placed substantial negative reliance on [the] illegitimate criterion," *id.* at 277.

I do not point to Justice O'Connor's concurring opinion merely to admire its common sense, though that is admirable. Rather, we must heed the direct evidence rule of *Hopkins* as controlling, and we may not diminish it, in the majority's terms, as a "passing reference." Justice O'Connor's concurring opinion in *Hopkins*, which in considered language required the use of direct evidence to prove a mixed motive case, must be viewed as the holding of the Court, under the rule of *Marks v. United States*, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds....") (citation and internal quotation marks omitted).

Because Justice O'Connor would permit the use of the mixed motives test only when direct evidence is present, Justice O'Connor "concurred in the judgment on the narrowest grounds," *see Marks* 430 U.S. at 193, and her concurrence is to be considered the holding of *Hopkins* under

the rule described in *Marks*. The view that Justice O'Connor's opinion is the holding in *Hopkins* is supported by Congress' actions in amending Title VII in 1991, by the holdings of other circuits on the issue, and by sound policy.

The 1991 amendments to Title VII did not modify the Supreme Court's prior holding on the need for direct evidence. Subsection (m) of 42 U.S.C. § 2000e-2, which incorporates the premise of *Hopkins* that discrimination can be shown in a mixed motive case so long as it is one factor, was enacted two years after *Hopkins*:

> Except as otherwise provided in this subchapter [42 U.S.C. § § 2000e *et seq.*], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m). Though Congress responded to other aspects of the Court's holding in *Hopkins*, specifically the holding that an employer could completely avoid liability if it could show that it would have made the same decision absent the discriminatory motive, *see* 42 U.S.C. § 2000e-5(g)(2); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995), Congress, in amending Title VII, did not respond at all to Justice O'Connor's direct evidence requirement, which had already been adopted by several circuit courts. Instead, the statutory amendments are silent as to that subject, neither praising nor condemning, neither adopting nor rejecting, and clearly not modifying Justice O'Connor's test, which is

properly viewed as the holding of *Hopkins*. This silence indicates that Congress left undisturbed Justice O'Connor's holding and the prior circuit decisions that adhered to it. As we remain bound by the Supreme Court's precedent, we must follow the direct evidence rule as explained in Justice O'Connor's concurrence.

By vitiating Justice O'Connor's direct evidence requirement, the majority's holding puts our circuit in conflict with almost all others. *See Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir. 1990); *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995); *Brown v. E. Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir. 1991); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997); *Schleiniger v. Des Moines Water Works*, 925 F.2d 1100, 1101 (8th Cir. 1991); *Heim v. Utah*, 8 F.3d 1541, 1547 (10th Cir. 1993); *E.E.O.C. v. Alton Packaging Corp.*, 901 F.2d 920, 923 (11th Cir. 1990). As suggested in the decision of the three-judge panel in *Costa*, and as reflected in the cases cited above, these circuits have correctly viewed Justice O'Connor's opinion in *Hopkins* as the holding of the Court and have followed it on that basis. *See Costa v. Desert Palace, Inc.*, 268 F.3d 882, 886-88 (9th Cir. 2001), vacated by 274 F.3d 1306 (9th Cir. 2001). I agree with the other circuits and with the reasoning of the prior opinion of the three-judge panel in *Costa*, which I adopt because it is faithful to precedent.[1] We should not rush to join

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[1] The three-judge panel held that:

a decision that turns its back on our colleagues' wisdom and engages our circuit in a fanciful frolic of its own.

Finally, apart from our duty to abide by precedent, policy concerns favor adhering to Justice O'Connor's view of mixed motives analysis. Mixed motives analysis is a departure from the well-established *McDonnell Douglas* framework. Whereas *McDonnell Douglas* requires the plaintiff to make a

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Even if Costa's evidence of differential treatment were found to raise an inference of discrimination, it does not "prove that her gender played a motivating part in an employment decision." *Price Waterhouse*, 490 U.S. at 258, 109 S. Ct. 1775 (plurality opinion); *see also* 490 U.S. at 280, 109 S. Ct. 1775 (O'Connor, J., concurring) ("I read [today's decision] as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons."). Costa's case comes down to the fact that she was the only woman in her workplace and that in some instances she was treated less favorably than her male coworkers. But she has failed to produce evidence that she was treated differently *because* she was a woman -"direct and substantial evidence of discriminatory animus." Accordingly, the district court erred in giving the jury a mixed-motive instruction. Because the court's instructions shifted the burden of proof to Caesars, the error was not harmless. *See Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992). Caesars was prejudiced, moreover, by the court's instruction that the jury had "heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex," a statement not supported by the record. Accordingly, the judgment must be vacated.

Costa, 268 F.3d at 889-90 (footnotes omitted).

pretext showing once an employer puts forth evidence of legitimate nondiscriminatory reasons for the challenged employment practice, mixed motive analysis allows a plaintiff to prevail even when she cannot prove pretext.

To keep the mixed motive framework from overriding in all cases the *McDonnell Douglas* rule and the pretext requirement, which it clearly was not meant to do, mixed motive analysis properly is available only in a special subset of cases. Justice O'Connor's direct evidence requirement meets this need: It requires the plaintiff to produce highly probative, direct evidence, before she may utilize the more lenient, mixed motives test. As a practical matter, without this or some similar constraint on when a plaintiff may invoke the mixed motives test, any plaintiff would opt for the *Hopkins* framework to avoid having to show pretext. The Supreme Court's seminal opinion in *McDonnell Douglas* would be effectively overruled by an incorrect interpretation of *Hopkins* that jettisons the direct evidence requirement, an effect that could not have been intended in *Hopkins* and an effect that will create uncertainty in our settled law.

Taken with the idea that plaintiff, an unsatisfactory employee, is a "trailblazer," the majority departs from the path of precedent and blazes its own trail beyond the frontiers of settled law into regions of error. I respectfully dissent.

APPENDIX B

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-15645
D.C. No. CV-96-00009-DWH/RJJ

[Filed October 2, 2001]

CATHARINA F. COSTA,
Plaintiff-Appellee,

v.

DESERT PALACE, INC., dba
Caesars Palace Hotel & Casino,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Nevada David Warner Hagen,
District Judge, Presiding

Argued and Submitted
September 13, 2000--Portland, Oregon

JUDGES:
Before Alex Kozinski and Andrew J. Kleinfeld, Circuit Judges, and William W Schwarzer,* Senior District Judge.

Opinion by Judge Schwarzer

ORDER

The panel has voted unanimously to withdraw the Opinion filed December 29, 2000.

The petition for rehearing is DENIED.

OPINION

SCHWARZER, Senior District Judge:

The central question before us is whether the district court erred in giving a mixed-motive instruction to the jury considering plaintiffs claim of discriminatory working conditions and wrongful discharge. We conclude that in the absence of substantial evidence of conduct or statements by the employer directly reflecting discriminatory animus, the giving of a mixed-motive instruction was reversible error.

FACTUAL AND PROCEDURAL BACKGROUND

Catharina Costa was employed by Caesars Palace Hotel & Casino (Caesars) as a warehouse worker from 1987

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

to 1994. She was the only woman in the bargaining unit covered by a collective bargaining agreement (CBA) between Caesars and Teamsters Local 995. A long history of disciplinary infractions and suspensions culminated in her termination in 1994, following a verbal and physical altercation with a fellow worker, Herbert Gerber. While Costa was fired, Gerber, a twenty-five year employee with a good disciplinary record and no prior suspensions, received only a five-day suspension. Both employees filed grievances under the CBA. An arbitrator sustained both disciplinary actions and found that Caesars had just cause to terminate Costa.

Costa filed this action alleging gender discrimination in connection with the conditions of her employment and her termination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1994) [hereinafter Title VII].[1] The jury returned a verdict for Costa, awarding $64,377 for financial loss, $200,000 in compensatory damages, and $100,000 in punitive damages. The court denied Caesars' motion for judgment as a matter of law but granted its motion for new trial or remittitur, conditioned on Costa's acceptance of a reduction of compensatory damages to $100,000. The court also awarded attorney's fees of $56,298 and judgment was entered accordingly. Caesars appeals. We have jurisdiction under 28 U.S.C. § 1291, and vacate the judgment on the conditions of employment claim, reverse on the termination claim; and remand for further proceedings consistent with this opinion.

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[1] Her state law claims were dismissed before trial.

DISCUSSION

I. THE MIXED-MOTIVE JURY INSTRUCTION

The district court submitted both the termination and the conditions of employment claims to the jury. It first instructed the jury that:

> The plaintiff has the burden of proving each of the following by a preponderance of the evidence:
>
> 1. Costa suffered adverse work conditions, and
>
> 2. Costa's gender was a motivating factor in any such work conditions imposed upon her. Gender refers to the quality of being male or female. If you find that each of these things has been proved against a defendant, your verdict should be for the plaintiff and against the defendant. On the other hand, if any of these things has not been proved against a defendant, your verdict should be for the defendant.

It then went on to give the following instruction, which is the central issue in this appeal:

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiffs sex and also by other lawful reasons. If you find that the plaintiffs sex was a motivating factor in the defendant's treatment

of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.

However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiffs gender had played no role in the employment decision.

Caesars' principal contention on appeal is that the district court erred by giving the jury a *Price Waterhouse* mixed-motive instruction rather than a *McDonnell Douglas* pretext instruction. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). It objected to the instruction at trial and offered a *McDonnell Douglas* pretext instruction, which the court rejected.

"Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading." *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996). Generally, we review the formulation of instructions for abuse of discretion. *See Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1046 (9th Cir. 1998). However, "[i]f the instructions are challenged as a misstatement of the law, they

are then reviewed *de novo." Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir. 1998) (citation and internal quotation marks omitted). Although the instruction did not misstate the law, Caesars argues that it was legal error to give it on the basis of the evidence presented at trial.

A Title VII employment discrimination claim may proceed on either a single-motive (or pretext) theory or a mixed-motive theory. In a pretext case, an employee must first make out a prima facie case of discrimination. If the employee succeeds, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its adverse employment action. *See McDonnell Douglas*, 411 U.S. at 802. If the employer makes that showing, the presumption raised by the prima facie case is rebutted and the burden of production then shifts to the employee to show that the employer's reason was pretext and the real reason was discriminatory. That burden merges with the ultimate burden of persuading the trier of fact that the employee has been the victim of intentional discrimination. *See Tex. Dep't of Cmty. Affairs v. Bur-dine*, 450 U.S. 248, 254-56 (1981).

In contrast, in a mixed-motive case, proof proceeds in two steps. First, the plaintiff must prove that"an impermissible motive played a motivating part in an adverse employment decision." *Price Waterhouse*, 490 U.S. at 250 (plurality opinion). Second, once "a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiffs gender into account." *Id.* at 258 (plurality opinion).

We have not heretofore addressed directly what evidentiary burden a plaintiff must satisfy to prove her gender was a motivating factor in an adverse employment action.[2] Our sister circuits have dealt with this issue and, though not in identical language, have all reached the conclusion that evidence that merely raises an inference of discrimination from differential treatment is not sufficient to shift the burden to the defendant. *See Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (lst Cir. 1990) ("If a plaintiff can provide direct evidence that gender bias infected the decision making process, the *Burdine* framework becomes irrelevant and the burden shifts to defendant .... Direct evidence is evidence which, in and of itself, shows a discriminatory animus."); (*Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171,182 (2d Cir. 1992) ("[T]hough sufficient proof that the forbidden factor played a 'motivating role' to entitle the plaintiff to a burden shifting instruction may be furnished through circumstantial evidence, that circumstantial evidence must be tied directly to the alleged discriminatory animus .... If the plaintiffs nonstatistical evidence is directly tied to the forbidden animus, for example, policy documents or statements of a person involved in the decision making process that reflect a discriminatory or retaliatory animus of the type complained of in the suit, that plaintiff is entitled to a burden-shifting instruction."); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995) ("In a 'mixed motives' or *Price Waterhouse* case, the employee must produce direct evidence of discrimination, i.e., more direct evidence than is

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[2] *Sischo-Nownejad v. Merced Community College District*, 934 F.2d 1104 (9th Cir. 1991), on which Costa relies, was a single-motive case decided under the *McDonnell Douglas* framework. *See id.* at 1110.

required for the *McDonnell Douglas/Burdine* prima facie case."); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995) ("To earn a mixed motive instruction ... requires "direct evidence that decision makers placed substantial negative reliance on an illegitimate criterion,'" quoting *Price Waterhouse*, 490 U.S. at 277, O'Connor, J., concurring); *Brown v. E. Miss. Elec. Power Ass'n*, 989 F.2d 858,861 (5th Cir. 1993) ("When a plaintiff presents credible direct evidence that discriminatory animus in part motivated or was a substantial factor in the contested employment action, the burden of proof shifts to the employer to establish by a preponderance of the evidence that the same decision would have been made regardless of the forbidden factor. Direct evidence is evidence which, if believed, proves the fact without inference or presumption."); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir. 1991) ("Under *Price Waterhouse*, such a burden on the defendant only arises where the plaintiff presents direct evidence that unlawful discriminatory animus was a substantial motivation for the adverse action."); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343,347 (7th Cir. 1997) ("Two methods exist for Plair to satisfy his burden of proof: by direct evidence that racial discrimination motivated Brash's decision to terminate him, or by the indirect, burden-shifting method of *McDonnell Douglas Corp. v. Green* .... '[D]irect evidence' is defined as evidence which 'if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption.'"); *Schleiniger v. Des Moines Water Works*, 925 F.2d 1100, 1101 (8th Cir. 1991) ("A mixed motive case exists either when (1) the employer "concedes that age was a discernible factor, but not a motivating one, for the employment decision' or (2) the "trial court finds that a discriminatory reason was a discernible factor in the

employer's decision-making process.'... Simply because a discriminatory reason might be inferred from a prima facie case does not mean that a mixed motive case exists."); *Heim v. Utah*, 8 F.3d 1541, 1547 (10th Cir. 1993) ("At best, it is only arguable that a discriminatory intent to keep Ms. Heim in the office be inferred from the statement. This type of inferential statement is not 'direct evidence' of discrimination satisfying the plaintiffs burden."); *E.E.O.C. v. Alton Packaging Corp.*, 901 F.2d 920, 923 (11th Cir. 1990) ("In a direct evidence case, the plaintiff must produce direct testimony that the employer acted with discriminatory motive, and must convince the trier of fact to accept the testimony .... If the plaintiff produces such evidence and the trier of fact believes it, the defendant must prove by a preponderance of the evidence that the defendant would have reached the same decision without the factor proved."); *Thomas v. Nat'l Football League Players Ass'n*, 131 F.3d 198, 204 (D.C. Cir. 1997) ("Burden-shifting under *Price Waterhouse* requires 'evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.'").[3]

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[3] The use of terms such as "direct" evidence should not be read as limiting the *type* of evidence a plaintiff such as Costa must present in order to receive a mixed-motive instruction. Rather, it is directed at the greater *quantum* of evidence required to establish a mixed-motive case. The reason for the distinction is that in a mixed-motive case the burden of proof shifts to the defendant once the plaintiff has produced sufficient evidence, while in a pretext case the burden always remains with the plaintiff. *See Price Waterhouse*, 490 U.S. at 258.

Costa contends that "the evidence [she] presented showed that Costa was definitely being treated differently than her male co-workers and a reasonable mind could conclude that it was because she was a woman." But of the incidents she relates, only two bear even a remote connection to gender: (1) an allegedly discriminatory assignment of overtime hours, and (2) a supervisor's comment referring to Costa as a "bitch."

With respect to the overtime claim, Costa first testified that when she confronted her supervisor about why Mark Dudenake, a male coworker, received more overtime, "I was flat out told he's a man and has a family to support." On cross-examination, however, Costa retracted this testimony, admitting that her supervisor had not used the word "man." The supervisor's statement was gender neutral, and Costa has failed to show that it establishes either that Dudenake received extra overtime *because* he was male, or that Costa was denied overtime *because* she was female. Indeed, it is undisputed that Dudenake had a family to support while Costa did not. Comments motivated by consideration of parental or marital status do not establish gender bias, and neither status is protected under Title VII. *See Bruno v. City of Crown Point*, 950 F.2d 355,362-63 (7th Cir. 1991).

Costa also points to testimony of Jeff Graham, a male coworker, that Assistant Warehouse Manager Karen Hallett (allegedly one of three decisionmakers in Costa's termination) told him that she "wanted to get rid of that bitch," in reference to Costa. The use of the word "bitch," she argues, directly reflects that gender was a "motivating factor" in her termination. Graham further testified, however, that Hallett told him that she wanted to get rid of Costa because she"did

not like the way that Catharina did her job" and because Costa was not a "team player." Other employees testified to personal animosity between Costa and Hallett, possibly exacerbated by Costa's role as union steward during a period of contentious labor relations. Testimony also showed that Hallett's aggressive management style offended other warehouse employees, both male and female. In this context, Hallett's use of the word "bitch" does not show discrimination because of Costa's gender. *See Barnett v. Dep't of Veterans Affairs*, 153 F.3d 338, 342-43 (6th Cir. 1998) (use of word "bitch" by supervisor who made it known that he disliked plaintiff and used her as the butt of office jokes is consistent with personal dislike rather than discriminatory animus); *Kriss v. Sprint Communications Co.*, 58 F.3d 1276, 1281 (8th Cir. 1995) (use of the word "bitch" is not an indication of general misogynist attitude where term was directed toward only one woman rather than women in general and was, therefore, not particularly probative of gender discrimination).

Costa's other evidence consists of various grievances about her treatment by Caesars, including a number of incidents in which she claims that she was treated differently from her male coworkers. Thus, she claims to have received warnings for tardiness and absenteeism not given to men, to have been asked by a supervisor while on an unscheduled break whether she had work to do when men were not, to have been forced to sign a United Way card when men were not, to have been written up for unsafe operation of a forklift when men were not, to have been suspended for using vulgar language when men were not, to have been excluded from an office where men were taking a break, to have been followed by her supervisor when men were not, and, finally, to have

been terminated for an altercation with a coworker who was not terminated.

Even if Costa's evidence of differential treatment were found to raise an inference of discrimination, it does not "prove that her gender played a motivating part in an employment decision." *Price Waterhouse*, 490 U.S. at 258 (plurality opinion); *see also id.* at 280 (O'Connor, J., concurring) ("I read [today's decision] as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons.").[4] Costa's case comes down to the fact that she was the only woman in her workplace and that in some instances she was treated less favorably than her male coworkers. But she has failed to produce evidence that she was treated differently *because* she was a woman--"direct and substantial evidence of discriminatory animus." Accordingly, the district court erred in giving the jury a mixed-motive instruction.[5] Because the court's instructions shifted the

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[4] In *Price Waterhouse*, the trial judge had found that some of the firm's partners' remarks about plaintiff "stemmed from an impermissibly cabined view of the proper behavior of women, and that Price Waterhouse had done nothing to disavow reliance on such comments." 490 U.S. at 236-37. Notably, one male partner advised her that in order to improve her chances of making partner she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235.

[5] The 1991 amendment to the Civil Rights Act do not alter the substantive analysis under *Price Waterhouse*, but provides a

burden of proof to Caesars, the error was not harmless.[6] *See Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992). Caesars was prejudiced, moreover, by the court's instruction that the jury had "heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiffs sex," a statement not supported by the record. Accordingly, the judgment must be vacated.

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nonmonetary remedy against discriminatory practices even where the employer establishes the affirmative defense. See 42 U.S.C. § 2000e-5(g)(2)(B). As the Second Circuit has held, the amendment "modifies *Price Waterhouse* by akering the legal consequences of a successful showing by the defendant on its affirmative defense." *Fields v. N.Y. State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 124 (2d Cir. 1997); *see also Watson v. Southeastem Pa. Transp. Auth.*, 207 F.3d 207, 216 (3d Cir. 2000); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir. 1992) ("[T]he Civil Rights Act of 1991 does not address our biggest problem: whether *Price Waterhouse* requires the plaintiff to show 'direct evidence' of discrimination as a precondition to shifting into mixed-motive analysis.")

[6] The case was submitted to the jury on a verdict form asking the jury, in substance: (1) whether "[p]laintiffs gender (sex) was a motivating factor in any adverse condition of employment," (2) whether "defendant's wrongful treatment of plaintiff was motivated both by gender and a lawful reason(s)," and (3) if so, whether "defendant has proved by a preponderance of the evidence that the defendant would have made the same decisions if the plaintiffs gender had played no role in the employment decision."

II. CAESARS' MOTION FOR JUDGMENT AS A MATTER OF LAW ON THE TERMINATION CLAIM

Caesars contends that the district court erred in denying its motion for judgment as a matter of law on Costa's termination claim.[7] We review the district court's decision *de novo*, and reverse only if the evidence, viewed in the light most favorable to the prevailing party, admits only of a contrary conclusion. *See Passantino v. Johnson & Johnson Consumer Prod., Inc.*, 212 F.3d 493,506 (9th Cir. 2000). If we conclude that the district court erroneously denied a motion for judgment as a matter of law, we may reverse and direct the court to enter a judgment as a matter of law. *See Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967).

Costa asserts that she "pled and presented this case upon the 'mixed-motive' method of proving disparate treatment." At no point during the litigation did she seek to

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[7] Caesars twice moved during trial for judgment as a matter of law on all of Costa's claims. The district court denied the motions. After trial, Caesars moved for judgment as a matter of law solely on Costa's termina tion claim and the award of punitive damages. The court again denied the motion. Because Caesars has limited both its Rule 50(b) motion and its assignment of error on appeal to the termination claim, we are not free to consider whether the motions should have been granted on both of Costa's claims. We note, however, that because Costa's entire case was presented solely as a mixed-motive case, our analysis with respect to the sufficiency of the evidence to support such a case, in section I of this opinion, would be dispositive of Costa's claim of discriminatory conditions of employment as well as her termination claim. We assume that the district court will be guided by that analysis on remand.

raise a pretext claim. The issue before us, therefore, is whether she presented substantial evidence of conduct or statements by persons involved in the decision to terminate her that directly reflects gender-based animus. Costa contends that her termination was the culmination of the disparate treatment she received and that men were treated differently from her in the application of discipline, up to and including termination. She points to the fact that although the altercation with Gerber precipitated her termination, he received only a five-day suspension. Even if these circumstances were found to raise an inference of discrimination, Costa points to no evidence that gender played a part in the decision--that she was terminated because she was a woman. See discussion at pp. 14065-68, *supra*. With respect to the termination claim, therefore, the judgment must be reversed.[8]

III. CAESARS' OTHER CONTENTIONS

Caesars contends that the district court erred in excluding the arbitrator's decision upholding Costa's termination. Because Caesars is entitled to judgment as a matter of law on the termination claim, and the arbitrator's decision is relevant solely to that claim, we need not address the issue.

Caesars further contends that it is entitled to judgment as a matter of law on the punitive damages claim, citing *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). The district court's damage instruction (# 13) and its

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[8] Costa's petition for rehearing did not specifically challenge the panel's decision reversing the judgment on the termination claim.

vicarious liability instruction (# 15) did not take into account the decision in *Kolstad*, handed down after the judgment became final. On remand, the court should apply *Kolstad* to the extent it may be appropriate. *See Passantino*, 212 F.3d at 514.

CONCLUSION

Because the evidence did not support the giving of the mixed-motive instruction on Costa's claim of gender discrimination, the district court erred and the judgment is vacated. Because the evidence did not support the giving of a mixed-motive instruction on the wrongful termination claim, the motion for judgment as a matter of law on that claim should have been granted and the judgment as to that claim is reversed. We remand for further proceedings consistent with this opinion.

VACATED in part; REVERSED in part; and REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-S-96-9-DWH(RJJ)

[Filed January 28, 1999]

CATHARINA COSTA,
Plaintiff,

v.

DESERT PALACE, INC. dba CAESARS PALACE HOTEL & CASINO, et al.,
Defendants.

ORDER

Before the court are plaintiff's motions for attorneys' fees and costs (#82) and to review the clerk's taxation of costs (#90) and defendant's motions for judgment as a matter of law (#87) and for a new trial or remittitur (#87).

I. Factual and Procedural Background

Plaintiff was hired in February 1987 by defendant Desert Palace, Inc. dba Caesars Palace Hotel & Casino ("Caesars") as the only female warehouse person in the food

and beverage warehouse. In her complaint, plaintiff alleged that she was treated differently from her male co-workers on the basis of her sex in the following ways: plaintiff was warned for absenteeism even though she had a written doctor's statement explaining her absence while male co-workers who had several unexcused absences were not so warned; she was issued a record of counseling for tardiness while her male co-workers who arrived late were not written up; she was never permitted to work overtime while her male co-workers were so permitted; she received an unwritten reprimand for "eating soup on a non-regular break" while male co-workers who were eating soup with plaintiff were not reprimanded; she was suspended for 30 days for allegedly using profanity and ethnic slurs without being given an opportunity to respond while no male worker had been suspended for using profanity. With respect to the 30-day suspension, plaintiff filed a grievance with her union and an independent arbitrator ruled on July 19, 1994 that Caesars did not have just cause to suspend Costa and must return the 30-day suspended pay to Costa.

Plaintiff also alleged that she was suspended and later terminated after she reported to defendant Hallet that she was assaulted by a male co-worker, defendant Gerber[1], in an elevator. Her termination notice stated she was terminated for "physical/verbal confrontation with [a] co-worker." She alleged that Gerber was sent home on the day of the incident and later suspended for five days. According to plaintiff, prior to this incident and subsequent to this incident, male workers

[1] The parties stipulated to dismiss defendant Gerber prior to trial. See Stipulation and Order for Dismissal of Defendant Herbert Gerber (#58).

who participated in physical and verbal altercations have not been terminated.

On June 10, 1998, plaintiff's action for sex discrimination under Title VII went to trial before a jury.[2] On June 15, 1998, the jury returned a verdict in favor of plaintiff, awarding her $64,377.74 in financial loss damages, $200,000 in emotional distress damages, and $100,000 in punitive damages.

II. Analysis

A. Defendant's Motion for Judgment as a Matter of Law Under Rule 50(b)

Rule 50(a) provides that after a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may grant judgment as a matter of law to the opposing party. Caesars made such a motion at the close of plaintiff's case and again at the close of all evidence but the court did not grant it, and the action was submitted to the jury. In such cases, Rule 50(b) allows renewal of the motion after the return of the verdict. Caesars did so by a written motion (#87).

A judgment as a matter of law is proper when the evidence permits only one reasonable conclusion. *Lawson v. Umatilla County*, 139 F.3d 690, 692 (9th Cir. 1998); *Crowe*

[2] Plaintiff previously voluntarily dismissed some of her claims and the court granted summary judgment (#s 43, 44) on the remainder, except for her sex discrimination claim.

v. Wiltel Communications Sys., 103 F.3d 897, 899 (9th Cir. 1996). The evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in favor of that party. *Amarel v. Connell*, 102 F.3d 1494, 1521 (9th Cir. 1996); *Electro Source, Inc., v. United Parcel Serv., Inc.*, 95 F.3d 837, 838 (9th Cir. 1996). When reasonable minds could differ over the verdict, judgment as a matter of law is inappropriate. See *Venegas v. Wagner*, 831 F.2d 1514, 1517 (9th Cir. 1987).

Caesars argues it is entitled to judgment as a matter of law because the evidence is insufficient to support a verdict in favor of plaintiff on her sex discrimination claim and is insufficient to support an award of punitive damages against Caesars. Caesars claims that "Costa's termination was the only discrete issue in the case and there is no substantial evidence supporting a verdict in favor of Costa on that issue." Motion at 2. As the court recognized in its order on Caesars's summary judgment motion, plaintiff's case involved allegations of discrimination not only in the circumstances of her termination but also in the conditions of her employment. At trial, the evidence showed a pattern of disparate treatment favoring male co-workers over plaintiff in the application of disciplinary standards, allowance of overtime, and in her termination. From this evidence reasonable minds could infer that plaintiff's gender played a motivating part in Caesars's conduct towards plaintiff under the mixed motive theory applicable to this case. Although Caesars presented evidence that it believed supported its claim that it would have fired plaintiff regardless of any consideration of her gender (i.e., the "live" suspension on her record), that was not the only reasonable conclusion that could be drawn from all of the evidence. Moreover, Caesars has not pointed to any evidence

demonstrating that it would have treated plaintiff differently with respect to discipline and overtime regardless of any consideration of her gender.

In *Ngo v. Reno-Hilton Resort Corporation,* 140 F.3d 1299, 1304 (9th Cir.), *amended on denial of reh'g by,* 156 F.3d 988 (9th Cir. 1998), cited by Caesars, the Ninth Circuit held that "to be entitled to an award of punitive damages, the plaintiff must demonstrate that the defendant 'almost certainly knew that what he was doing was wrongful and subject to punishment.'" In *Ngo*, the Ninth Circuit upheld the district court's denial of punitive damages despite an award of compensatory damages because the defendant's discriminatory employment decisions favoring a white female over an Asian-American female were attributable to negligent decision-making and poor communication among managers, not an evil motive. *Id.* at 1304-05. Caesars claims that this standard was not met at trial because plaintiff presented no direct evidence of hostility or animosity based on gender, involvement by higher management in the discriminatory decisions, or a pattern of flouting the law. Yet there was evidence of a pattern of intentional, not merely negligent, discriminatory conduct by plaintiff's supervisor and others in Caesars's management, culminating in plaintiff's termination, which was sufficiently egregious to support an award of punitive damages.

B. Defendant's Motion for a New Trial or Remittitur

"The trial judge in the federal system... has discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.,* 356 U.S. 525,540 (1958). "This discretion

includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)." *Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415, 433 (1996). Even substantial evidence supporting the verdict does not deprive the trial judge of discretion to grant a new trial if the verdict is against the clear weight of the evidence. *Landes Constr. Co., Inc. v. Royal Bank of Canada,* 833 F.2d 1365, 1371 (9th Cir. 1987). There is little guidance on the standard to be applied in the exercise of this discretion, however.

The judge can weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party. But after weighing the evidence, the trial judge faces a difficult task:

> It may be doubted whether there is any verbal formula that will be of much use to trial courts in passing on motions [for a new trial on the grounds the verdict is against the clear weight of the evidence]. Necessarily all such formulations are couched in broad and general terms that furnish no unerring litmus for a particular case. On the one hand, the trial judge does not sit to approve miscarriages of justice. His power to set aside the verdict is supported by clear precedent at common law and, far from being a denigration or usurpation of jury trial, has long been regarded as an integral part of trial by jury as we know it. On the other hand a decent for the collective wisdom of the jury, and for the

> function entrusted to it in our system, certainly suggest that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter. Probably all that the judge can do is to balance these conflicting principles in the light of the facts of the particular case. If, having given full respect to the jury's findings, the judge is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial.

Id. at 1371-72 (citations omitted).

Caesars contends that the compensatory damages award of $200,000 for emotional harm is excessive and against the manifest weight of the evidence. Caesars argues that Title VII *requires* medical evidence of emotional harm and corroborating testimony from plaintiff's supervisor, family, friends or other others with knowledge of the emotional harm to support an award of emotional harm damages. However, Caesars cites only to a policy guideline of the EEOC pursuant to which *"the Commission* will *typically* require medical evidence of emotional harm to seek damages for such harm in conciliation negotiations" and which also states "there *should* be corroborating testimony" regarding the emotional harm. EEOC Policy Guidance No. 915.002 § II(A)(2) at 10-12 (emphasis added). This falls far short from establishing a evidentiary requirement for recovering emotional harm damages under Title VII. Moreover, in cases involving other civil fights statutes which can offer guidance for Title VII actions, the Ninth Circuit has held that compensatory damages may be awarded for

emotional harm established by the plaintiff's testimony or inferred from the circumstances and that no evidence of economic loss or medical evidence of mental or physical symptoms stemming from the emotional distress need be submitted. *Johnson v. Hale,* 940 F.2d 1192, 1193 (9th Cir. 1991) (section 1983 case); see also *Odima v. Westin Tucson Hotel,* 53 F.3d 1484, 1498 (9th Cir. 1995) (in section 1981 case, employee's testimony alone regarding his feelings of frustration, helplessness, and isolation after his six transfer applications had been rejected and racist comments were made was sufficient to support a compensatory damages award).

Here, plaintiff testified that she felt terrible about her treatment at Caesars and could not bear going to work and that she sought treatment for tension headaches from her family doctor. She also testified about the difficult circumstances she endured after she was fired, including that her savings became depleted, that she couldn't make payments on her newly purchased home in which her mother also resided, and that she was contemplating bankruptcy. Although the court finds that the jury's award of compensatory, damages is not against the manifest weight of the evidence because neither medical nor corroborating testimony is required to prove emotional harm, the amount of the award does appear excessive. Plaintiff's testimony and medical records indicate that the emotional harm suffered by plaintiff was neither severe nor enduring,[3] though plaintiff undoubtably suffered during the time she was subjected to

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[3] Plaintiff testified that she did not have headaches after she ceased working for Caesars and that she is currently able to work.

discriminatory treatment in her daily job at Caesars and for a period of time after her termination. Accordingly, Caesars's motion for a new trial will be denied on the condition that plaintiff accept a reduction in compensatory damages from $200,000 to $100,000 within 30 days of the service of this order. If plaintiff does not, Caesars's motion for a new trial will be granted on the issue of the amount of compensatory damages only.

C. Plaintiff's Motion for Attorney's Fees and Costs

Caesars does not dispute that plaintiff is entitled to attorney's fees and costs as a prevailing party under Title VII but seeks a reduction in the amount of such fees and costs sought by plaintiff.

1. Setting the Fee

The procedure for setting a reasonable attorney's fee is outlined in *Morales v. City of San Rafael,* 96 F.3d 359, 363-65 & nn. 8-12 (9th Cir. 1996), *amended on denial of reh'g by,* 108 F.3d 981 (9th Cir. 1997): (1) determine the number of hours the prevailing party reasonably expended on the litigation; (2) determine the reasonably hourly rate; (3) multiply the number of hours by the hourly rate to determine the "lodestar"; and (4) if necessary to the setting of a reasonable fee, adjust the lodestar in light of the LR 54-16 factors[4] not already taken into account. The adjustment in the fourth step is known as a "multiplier." *Guam Soc'y of*

[4] In essence. LR 54-16 is a codification of the 12 *Kerr* factors. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).

Obstetricians & Gynecologists v. Ada, 100 F.3d 691,697 (9th Cir. 1996). There is a strong presumption that the lodestar is the one reasonable fee, some LR 54-16 factors are already subsumed in the lodestar, and the fee applicant must show that an adjustment to the lodestar is "necessary" – in other words, a prevailing plaintiff must make a strong showing to warrant the application of a multiplier. *Morales,* 96 F.3d at 363-64 & nn. 8-9. On the other hand, where a plaintiff' s success was "limited" the attorney's fees "must be reduced to reflect the limited degree of [] success," and although "[t]here is no precise formula for determining the extent to which a party has prevailed," the difference between what is sought and what is recovered is not the only consideration. *LeMaire v. Maass,* 12 F.3d 1444, 1461 (9th Cir, 1993); *see Morales,* 96 F.3d at 364.

2. Calculation of the Lodestar

a. Reasonable Hours

Plaintiff seeks compensation for a total of 287.4 billed hours from the time of the initial meeting between plaintiff and her counsel through trial. Plaintiff supports her claimed hours with an affidavit of her counsel, Robert N. Peccole, and a twelve-page billing statement detailing the number of hours spent on each task and providing a short description of the task. See Motion (#82) & Exh. 1.

Caesars makes several challenges to specific items billed. First, Caesars challenges the time allegedly spent on clerical matters, including time claimed for organizing documents and preparing a list of documents, bate stamping documents, and delivering documents. However, plaintiff

clarified in her reply that no time was actually billed for bate stamping documents or delivering documents but that time was billed for reviewing and indexing bate stamped documents received from Caesars and revising a joint discovery report. A review of the billing statement confirms plaintiff's explanation. Further, this court finds that time spent organizing documents and preparing a list of documents for disclosure in compliance with LR 16-1 is compensable attorney time, especially in light of the few hours involved.

Second, Caesars objects to amount of time claimed for preparing the complaint and opposing summary judgment. Caesars argues that 14.8 hours spent preparing the complaint is excessive. However, this time included performing legal research, two meetings between plaintiff and her counsel, and drafting the complaint. In this context, 14.8 hours to prepare a complaint does not appear excessive on its face and Caesars offers no other reasons why it should be considered excessive. Caesars also contends that spending 39.10 hours to oppose a summary judgment motion is excessive. Yet Caesars does not indicate how much time was spent preparing its summary judgment motion and supporting exhibits. Caesars's motion for summary, judgment was detailed, addressing each of plaintiff's six claims remaining at that time and containing many exhibits. Summary judgment is a crucial stage for any lawsuit and it was not unreasonable for plaintiff's counsel to spend 39.10 hours in this case to oppose Caesars's summary judgment motion.

Third, Caesars argues that none of the 18 hours claimed for co-counsel's time at trial should be compensated. Caesars directs the court's attention to the fact that the co-counsel was not involved in any pretrial-work on the case as

shown by the billing statement and that Caesars was represented by only one attorney at trial. In her reply, plaintiff argues that co-counsel's presence was necessary at trial to monitor plaintiff's numerous exhibits, to coordinate witnesses, to consult on issues and to monitor time usage since each party was allocated only ten hours for the trial. Plaintiff also points out that Caesar's counsel was joined in the courtroom during trial by a legal assistant and a representative of Caesars. Because co-counsel performed tasks which could have been performed by a legal assistant and did not take an active role in the case prior to trial, the court will allow his time to be claimed only a rate of $80 per hour.

b. Reasonable Hourly Rate

Defendants do not object to the reasonableness of plaintiff's counsel's $180 pre-trial hourly rate and $250 hourly rate for trial. As stated above, time billed by co-counsel during trial will be compensated at a hourly rate of $80. Thus, the lodestar amount can be calculated as follows: 251.4 hours multiplied by $180 (or $45,252) plus 18 hours multiplied by $250 (or $4500) plus 18 hours multiplied by $80 (or $1440) for a total of $51,192.

c. Adjusting the Lodestar

The lodestar amount should be considered in light of the LR 54-16 factors. Some factors are inapplicable (for example, (J) time limitations imposed by the client or the circumstances), or subsumed in the lodestar (for example, the customary fee, the novelty and complexity of the issues, the special skill, experience, and reputation of counsel, and the

quality of representation). See *Snell v. Reno Hilton Resort,* 930 F.Supp. 1428, 1432-33 (D.Nev. 1996) (listing factors subsumed in the lodestar figure). In this case, defendants seek a reduction of the lodestar to take into account plaintiff' s lack of success on her other eight claims which were eliminated at summary judgment or voluntarily dismissed. See LR 54-16(b)(3)(C). When a plaintiff wins on some claims and loses on others, the plaintiff may recover on the unsuccessful claims only if they are legally or factually related to the prevailing claim. In that case, however, the court must consider the overall success of the lawsuit. *Hensley,* 461 U.S. at 434-35.

On the issue of "relatedness" of successful and unsuccessful claims, the Ninth Circuit has held:

> The test for relatedness of claims is not precise. However, related claims will involve "a common core of facts" or will be based on related legal theories, while unrelated claims will be "distinctly different," and based on different facts and legal theories .... Thus, the test is whether relief sought on the unsuccessful claim "is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury upon which the relief is granted is premised."

Thorne v. City of El Segundo, 802 F.2d 1131, 1141 (9th Cir. 1986) (citations omitted). In *Odima v. Westin Tucson Hotel,* 53 F.3d 1484 (9th Cir. 1995), the Ninth Circuit considered whether a plaintiff's unsuccessful state tort claims for

retaliation, constructive discharge, and wrongful termination were "related to" his successful Title VII and section 1981 claims for purposes of an attorney fee award. Because all of the plaintiff's claims arose from a common core of facts involving his employment relationship with the defendant and thus virtually the same evidence supported both the successful and unsuccessful claims, the court found that the claims were related. *Id.* at 1499.

As in *Odima,* plaintiff's unsuccessful claims for sexual harassment, tortious discharge, intentional infliction of emotional distress, battery, relief under respondeat superior, negligent hiring, retention and/or supervision, retaliation and breach of contract and her successful sex discrimination claim arose from the same common core of facts concerning her employment relationship with Caesars. Although the battery claim was brought only against defendant Gerber, the incident involving the alleged battery was Caesars's reason for terminating plaintiff. One of the allegations supporting plaintiff's sex discrimination claim was that defendant Gerber was treated more favorably than plaintiff by Caesars as a result of the incident involving the alleged battery. Thus, the facts of plaintiff's voluntarily dismissed battery claim were intertwined with plaintiff's other causes of action, including her successful sex discrimination claim. Cf. *Reed v. A.W. Lawrence & Co., Inc.,* 95 F.3d 1170, 1183 (2nd Cir. 1996) (upholding district court's finding that successful retaliation claim was related to voluntarily dismissed sex discrimination claims for purposes of fee award).

Although plaintiff's successful and unsuccessful claims are related, the court must still consider the overall success of plaintiff's lawsuit to determine if a full award of the requested

fees is warranted. *Hensley,* 461 U.S. at 435. Caesars argues that plaintiff achieved only partial or limited success because eight out of plaintiff's nine claims were eliminated or dismissed before trial. Although the number of claims eliminated or dismissed before trial suggest that the overall success of plaintiff's suit was limited, the types of damages available for plaintiff' s unsuccessful claims largely overlap with the damages actually awarded to plaintiff for her successful Title VII sex discrimination claim. Moreover, the amount of back pay, compensatory and punitive damages awarded by the jury, even after the court's reduction of compensatory damages, is significant. Thus, a reduction of the lodestar is not warranted in light of plaintiff s overall success.

3. Nontaxable Costs

Because Caesars does not oppose plaintiffs request for $780.38 in non-taxable copying costs, see Plaintiff's Motion (#82), Exh. 2, this amount will be added to the lodestar for reasonable fees.

Therefore, plaintiffs motion for attorney's fees and costs will be granted for the total amount of $51,972.38.

D. Plaintiff's Motion for Review of Clerk's Taxation of Costs

On June 24, 1998, plaintiff submitted a bill of costs claiming a total of $4,537.35 in taxable costs. Upon objection by Caesars (#84) to certain items claimed in the bill of costs, the clerk of the court taxed costs in the amount of $464 because plaintiff s counsel had failed to provide the proper

documentation for fees for the service of summons and subpoena, for copies, for photographs, for depositions, and for service of subpoena on Dr. Hoffman. See Clerk's Memorandum Regarding Taxation of Costs (#86). The clerk also denied certain fees for witnesses because those witnesses were not used at trial. *Id.* On July 2, 1998, plaintiff filed a motion for review of the clerk's taxation of costs under LR 54-14 and Fed.R.Civ.P. 54(d). No opposition has been filed.

Plaintiff concedes that she inadvertently failed to attach the proper documentation supporting her bill of costs but was unable to respond to Caesars's objection and provide the proper documentation before the clerk taxed costs in the amount of $464. Plaintiff attaches to her motion invoices for depositions costs claimed (totaling $3660.50), a receipt for photographs used at trial ($20.70), and an invoice for the service of a subpoena on Dr. Hoffman ($55). Plaintiff does not include any documentation of fees for the service of summons and subpoena or for copies (which were itemized in the original application). Nor does plaintiff contest the denial of witness fees for witnesses not used at trial.

> LR 54-1 (b) provides in part (with emphasis added):
>
> Every bill of costs and disbursements shall be verified and distinctly set forth each item so that its nature can be readily understood. The bill of costs shall state that items are correct and that the services and disbursements have been actually and necessarily provided and made. An itemization and, *where available,*

documentation of requested costs in all categories must be attached to the bill of costs.

Because the plaintiff has now provided the court will proper documentation of deposition costs and fees for photographs used at trial, those amounts (totaling $3681.20) will be taxed. In addition, although plaintiff did not provide documentation of the fees for copies, documentation is only required under LR 54-1 (b) "where available" and plaintiff did provide itemization of the copying costs. Accordingly, the court finds that documentation for such incidental costs as copying costs is not always necessary and will order that an additional amount of $181.40 be taxed for such costs. Plaintiff concedes that she is not entitled to witness fees for Dr. Hoffman because she fails to rebut the presumption that Dr. Hoffman's attendance at trial was unnecessary. Although not addressed by the Local Rules, the court finds that the cost of service of a subpoena on an unnecessary witness should not be allowed.

Thus, the court will grant plaintiff's motion for review of the clerk's taxation of costs and will require the clerk to tax additional costs in the amount of $3862.60.

III. Conclusion

Accordingly, **IT IS ORDERED** that defendant's motion (#87) for judgment as a matter of law is DENIED; defendant's motion (#87) for a new trial is DENIED on the condition plaintiff accept a reduction of compensatory damages to $100,000 within 30 days of the service of this order. If plaintiff does not accept this reduction, Caesars' s

motion (#87) for new trial will be granted on the issue of the amount of compensatory damages only.

IT IS FURTHER ORDERED that plaintiff's motion for attorney's fees and costs (#82) is GRANTED in the amount of $51,972.38.

IT IS FURTHER ORDERED that plaintiff's motion (#90)for review of the clerk's taxation of costs is GRANTED and the clerk is instructed to tax additional costs in the amount of $3862.60

DATED: This 25th day of January, 1999.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-S-96-009-DWH(RJJ)

[Filed June 15, 1998]

CATHARINA F. COSTA,
Plaintiff,

vs.

DESERT PALACE, INC., dba CAESARS PALACE HOTEL & CASINO; HERBERT GERBER; RICHARD J. STEWART; and KAREN HALLET,
Defendants.

VERDICT FORM

We the jury, duly impaneled and sworn upon our oaths, submit the following verdict:

1. Do you find that Defendant Caesars Palace violated the Civil Rights Act in that Plaintiff' s gender (sex) was a motivating factor in any adverse condition of plaintiff's employment?
Yes _X_ No ___

NOTE: If you answered No to Question 1, your deliberations are complete and you need not answer any further questions. If you answered yes, please answer the following special interrogatory:

2. Do you find that the defendant's wrongful treatment of plaintiff was motivated both by gender and a lawful reason(s)?
Yes _X_ No ___

If your answer was "Yes", answer the next question. If your answer was "No", proceed to question No. 4.

3. If so, has the defendant proved by a preponderance of the evidence that the defendant would have made the same decisions if the plaintiff's gender had played no role in the employment decision?
YES ___ NO _X_

If you answered "Yes", stop and sign and date this form. If you answered "No", please continue.

4. What amount of financial loss do you find should be awarded to Plaintiff?
$64377.74.

5. What amount of damages do you find should be awarded to Plaintiff for emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life?
$200,000.00

6. Was Defendant's violation willful and egregious or committed with reckless disregard to plaintiff s rights?
Yes _X_ No ____.

NOTE: If you answered No to Question 6, your deliberations are complete and you need not answer any further questions.

7. If you answered Yes to Question 6, what amount of damages do you find should be awarded to Plaintiff for punitive damages? $ 100,000.00

/s/ _____
JURY FOREPERSON

6/15/98
Date